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FAIR TRIAL/FREE PRESS ISSUES IN THE FEDERAL CRIMINAL TRIALS OF TIMOTHY McVEIGH AND TERRY NICHOLS

A DISSERTATION

SUBMITTED TO THE GRADUATE FACULTY

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Degree of

DOCTOR OF PHILOSOPHY

By

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FAIR TRIAL/FREE PRESS ISSUES IN THE FEDERAL CRIMINAL TRIALS OF TIMOTHY McVEIGH AND TERRY NICHOLS

A DISSERTATION APPROVED FOR THE
GAYLORD COLLEGE OF JOURNALISM AND MASS COMMUNICATION

BY

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DEDICATION

This dissertation is dedicated to my wife, Erica Nye, and my son, Walker Wilson Grant Nye. Erica was with me through the long days and nights I spent covering the Oklahoma City bombing trials as a reporter for KJRH-TV in Tulsa, Oklahoma in 1997 and 1998. She was with me as well through the long days and nights I spent researching and writing this dissertation. Walker was born on April 19, 1998, which was the third anniversary of the Oklahoma City bombing. His birthday is forever linked with the events that are the focus of this study. Erica and Walker have been my inspiration in pursing my doctoral degree. They have sacrificed much and supported me completely along the way. I will never be able to express enough gratitude to them, and this dissertation is dedicated to them.

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ABSTRACT

This study examines fair trial/free press issues involved in the federal criminal trials of Timothy McVeigh and Terry Nichols for the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoman. The bombing case attracted intense press coverage resulting in conflicts between the First Amendment right of the press to cover court proceedings and the Sixth Amendment right of the defendants to receive a fair trial before an impartial jury. In resolving the fair trial/free press conflicts, the courts managing the case made several decisions deserving examination. These decisions included a rare federal change of venue, a decision to seal hundreds of case documents, and a decision to impose orders restricting out-of-court statements on two different occasions. The change of venue decision had ramifications that made the bombing trials a truly unique episode in American justice. In response to the change of venue, Congress passed legislation allowing for closed-circuit broadcasts of the trial. Thus the Oklahoma City bombing trials became the first, and to date the only, federal criminal trials with a live camera presence. The Oklahoma City bombing trials were important episodes in American legal history; however, the literature suggests the trials, and specifically the fair trial/free press issues implicated in the trials, have remained relatively unexplored.

This study employed historical methods to evaluate primary source materials. Primary sources consisted of court documents, contemporaneous press reports, and oral history interviews with defense attorneys Stephen Jones and Michael Tigar. The study identified 12 major fair trial/free press issues present in the Oklahoma City bombing case. The study explains how those issues emerged, how the courts resolved those

issues, and how the courts' resolution of those issues affected management of the trials. This study also explains how the unprecedented closed-circuit broadcasts became a part of the trials and how the trial court managed the closed-circuit broadcasts.

INTRODUCTION

On Thursday, April 24, 1997, Special Prosecutor Joseph Hartzler addressed a panel of twelve jurors and six alternate jurors in Denver, Colorado's Byron G. Rogers Federal Building. "Ladies and gentlemen of the jury," Hartzler said. "April 19th, 1995, was a beautiful day. The sun was shining. Flowers were blooming. It was springtime in Oklahoma City."[1] With those words, the federal bombing trial of Timothy McVeigh began. In many respects, this was a trial like no other before or since.

Hartzler made his remarks in a packed courtroom. Reporters from across the United States and from around the world took up ten rows of reserved media seating in the courtroom. Many more reporters listened to a live audio feed of Hartzler's statement in an adjacent courtroom set aside by the court to provide for the anticipated overflow crowd.[2] Outside the Byron G. Rogers Federal Building, the remainder of the 2,000-member press corps stood watch in a specially designed media area known as the "bullpen."[3] Five hundred miles away in Oklahoma City, Oklahoma, 150 bombing victims watched and listened to Hartzler's statement via a closed-circuit broadcast of the proceedings fed live to the Federal Aviation Administration's facility at Will Rogers World Airport.[4] The closed-circuit broadcast made the McVeigh trial the first federal criminal trial in U.S. history with any type of live camera presence.

The prosecution of the Oklahoma City bombing defendants, Timothy McVeigh and Terry Nichols, was a unique journey to justice in many respects. The crime itself was unprecedented at the time it occurred. The bombing on April 19, 1995, killed 168 people and injured many more. The victims, including family members of those killed and injured in the blast and people who suffered property damage and financial loss

resulting from the bombing, numbered into the thousands. Prior to September 11, 2001, the Oklahoma City bombing was known as the worst act of terrorism ever committed on American soil.

The investigation and prosecution of the suspects took place in a glaring media spotlight. In 1995, the twenty-four-hour-a-day cable news culture was firmly established in the media marketplace, and the Internet was beginning to stake its claim as a viable information source. Both around-the-clock media coverage and the burgeoning Internet would play key roles in coverage of the bombing case.[5] These modern media technologies also helped broaden the scope of the media spotlight. News organizations from across the United States and from countries around the world came to Oklahoma City, and later Denver, to cover the investigation and prosecution of the case.[6] It was a story of international importance, and the intense press focus presented challenges for the court in trying to balance the rights of the defendants and the rights of the press.

The unique nature of the crime, the large number of victims, and the intense focus of the press set the stage for a clash between First Amendment and Sixth Amendment rights. Before the federal trials were concluded with the conviction and sentencing of Terry Nichols in 1998, there would be several rare, and sometimes unprecedented, actions taken by the court and federal lawmakers.

In the interest of preserving the defendants' rights to a fair trial, the United States Tenth Circuit Court of Appeals removed the federal judge in Oklahoma in charge of the case and turned it over to U.S. District Court Judge Richard P. Matsch in the U.S. District of Colorado.[7] Judge Matsch would later issue a change of venue, moving the

case to Denver, a rarity in federal criminal prosecutions. Press coverage in Oklahoma City, the venue of original jurisdiction, was a significant factor in Judge Matsch's decision.[8]

Due to the large number of press organizations covering the case, Judge Matsch made several decisions related to press and public access to the courts and court records. First, he allowed a live audio feed to an adjacent courtroom for the press and the public during times when an overflow crowed was expected. Second, Matsch allowed reporters to receive audiotaped copies of pretrial hearings, a practice that lasted only a short while.[9] While these decisions promoted access to the court for the press and the public, Judge Matsch made other decisions that greatly restricted access to information. These decisions drew protests from the press. Even before Judge Matsch took over the case, judges in the Western District of Oklahoma instructed attorneys to file all documents that might reveal investigative information, evidence, or trial strategy under seal. Judge Matsch modified this practice once he took control of the case, but filing documents under seal lasted throughout the case, and it was an ongoing point of contention with the press.[10]

Judge Matsch also imposed restrictions on the out-of-court statements made by attorneys and other persons under the court's authority. These restrictions drew the ire of the press and the defense teams as well. McVeigh's defense team, and to a lesser degree the Nichols defense team, claimed the orders made it impossible for them to defend their clients in the court of public opinion, which they deemed especially important in a case that drew such intense press coverage.[11] Also, allegations of leaks to the press came from both prosecutors and defense attorneys, who charged each other

several times with violating the judge's orders. The issue of press leaks reached a crisis point on the eve of the McVeigh trial when two stories reporting alleged confessions by Timothy McVeigh were published via the Internet and threatened to derail the case.[12]

The press was not the only group fighting for access to the court and information about the case. Many victims, upset over the change of venue, began searching for ways to have the trial broadcast so that they could see justice done without incurring the expense and inconvenience of traveling to Denver. When petitions to the court failed to produce the results they wanted, a group of victims organized and took their fight to Washington, D.C.[13] Their efforts succeeded with the passage of the Antiterrorism and Effective Death Penalty Act of 1996, which included a provision for a closed-circuit broadcasting of any federal trial moved more than 350 miles from the court of original jurisdiction. This law directly challenged the federal court's long-standing prohibition against cameras at criminal trials, even though it restricted the "broadcast" to a limited audience of court-approved viewers.[14] Judge Matsch's decisions on complying with the new law and his decision on whether or not to allow the press access to the closed-circuit broadcast were firsts for a United States federal judge.

The press corps covering the McVeigh and Nichols trials took some unprecedented steps of its own in preparing for the trial. Early on in the case, broadcasters and print media formed their own respective groups to petition the court on free press issues. The group representing broadcasters was known as The Colorado-Oklahoma Trial Group. The group representing print media was known as The Colorado-Oklahoma Print Media Group. These two organizations served as the foundation for what would become known as the Oklahoma City Bombing Trial Media

Consortium. The purpose of the consortium was to coordinate logistics for media organizations covering the trials and to serve as a liaison organization for the press and the court. Eventually more than 130 media organizations joined the consortium.[15] The consortium was a major component in the negotiated coverage strategy that the press corps operated under to cover the McVeigh and Nichols trials. Such a coordinated and negotiated coverage strategy for a federal criminal trial was not common in the United States.

The trials of Timothy McVeigh and Terry Nichols were important events in the history of American justice. In many respects the trials were unique. The crime itself was unprecedented at the time. The case attracted intense press coverage, and the court had to take measures to mitigate the press coverage to preserve the defendants' rights to a fair trial. Granting a change of venue in a federal criminal case, while not unprecedented, was a rare occurrence nonetheless. Other prescriptive measures such as restricting out-of-court statements and allowing for sealed court filings were also not unheard of, but in a case that attracted national and international press coverage, limiting pretrial publicity was a major challenge. The most unique aspect of the trial was the closed-circuit broadcast of testimony from Denver to Oklahoma City to which the press was not allowed. No court before or since has faced such a situation, and the court's decision to bar the press from the viewing may set a precedent for courts in the future.

Despite the unique nature of the McVeigh and Nichols trials and the evidence of fair trial/free press conflicts, no researcher has yet fully examined the First and Sixth Amendment issues involved in the case. Most of the major scholarly work on the

Oklahoma City bombing consists of studies focusing on the militia movement in America and its influence on the bombing conspirators.[16] Other scholarly studies have examined governmental and emergency personnel response to the bombing scene itself.[17] Another focus of researchers has been the physical and emotional impact of the Murrah Building bombing.[18] There have also been examinations of the investigation of the crime, most of which seek evidence to support or discredit claims of a broader conspiracy.[19] Participants in the McVeigh and Nichols trials have written sparingly on the topic. Terry Nichols's lead attorney, Michael Tigar, has written an article discussing how he came to accept the Nichols case and his views on the ethics of defending unpopular clients.[20] The International Society of Barristers has published remarks given by bombing prosecutor Larry Mackey and McVeigh's lead counsel Stephen Jones at the society's 1998 convention.[21] Stephen Jones has published most frequently on the topic, with a book and three journal articles.[22] Jones also co-authored the sole article to address fair trial/free press issues in the McVeigh trial in any detail, a 1998 article published in *The Chicago Legal Forum* titled "McVeigh, McJustice, McMedia".[23]

The historical study presented here focuses squarely on fair trial/free press issues in the McVeigh/Nichols cases; it does so for three primary reasons. First, the conflict between the First Amendment, which protects the right of the press to cover trials, and the Sixth Amendment, which protects defendants' rights to a trial before an impartial jury, likely played a significant role in the courts' management of the trial from the beginning through to its conclusion. Understanding the influence of the press on the management of the trials is vital in understanding how the trials took the form they did.

Secondly, the closed-circuit telecast of the trial was an unprecedented event that deserves scholarly examination. The change of venue that moved the case to Denver prevented many bombing victims from being able to attend the trials in person. Also, the federal court rules prohibiting broadcasting from federal courts meant broadcasting the trial was not possible. Congress intervened and passed a measure providing for closed-circuit broadcasts of trials, making the federal trials of Timothy McVeigh and Terry Nichols the first, and to date the only, federal criminal trials televised in any form. The precedent-setting closed-circuit broadcast of these trials could serve as a model for future high profile federal trials. An understanding of how the Oklahoma City bombing closed-circuit broadcast was conceived and implemented could assist scholars studying similar trials in the future. Finally, while researchers have examined several aspects of the bombing case in detail, only a small amount of literature has focused on the trials and the fair trial/free press issues the courts had to address during the life of the case. The in-depth examination of those issues presented in this study fills a gap in the literature and advances knowledge in the fields of journalism and legal studies.

CHAPTER I

Review of Literature

On April 19, 1995, Americans witnessed the worst act of domestic terrorism ever committed against the United States. On that bright spring day, a bomb ripped apart the Alfred P. Murrah Federal Building in downtown Oklahoma City, killing 168 people. The terrorist attacks of September 11, 2001 would later eclipse the physical damage and lives lost in the Oklahoma City bombing, but the events of September 11 were the design of a foreign enemy. The Oklahoma City bombing was an act of terrorism designed by citizens of the United States and carried out against citizens of the United States. At the time of the bombing, the initial suspicion of law enforcement and of the general public was that the bombing must be the work of foreign terrorists. The realization that the suspects were the product of homegrown hate came as a shock to many people.[1]

The three bombing conspirators – Timothy McVeigh, Terry Nichols, and Michael Fortier – were drawn together and driven to commit the crime in part due to their strong anti-government views.[2] Such anti-government ideology was at the core of militia groups, the Patriot Movement, and white supremacist groups, all of which were on the rise in the years leading up to the Oklahoma City bombing.[3] Much of the scholarly work regarding the Oklahoma City bombing and the conspirators has focused on the role anti-government ideology played in the motives of the conspirators.[4]

Another focus of Oklahoma City bombing researchers has been the possibility that the bombing was part of a broader conspiracy and the possibility that not all of the conspirators have been brought to justice.[5] Stephen Jones, who was McVeigh's lead

attorney at his trial, advances such a theory in his book titled *Others Unknown: The Oklahoma City Bombing and Conspiracy*.[6] Jones's book, co-authored by Peter Israel, is one of the few works to give extensive attention to the prosecution of the conspirators; however, the main focus of the book is to advance the theory of a broader conspiracy.

Journalists from around the world covered the arrests and prosecution of the three suspects.[7] Fortier made a plea agreement with the government. In exchange for testifying against McVeigh and Nichols, and in exchange for pleading guilty to having knowledge of the bomb plot and failing to warn police, Fortier received a reduced jail sentence. Fortier served approximately 10 years in prison. He was released in January 2006.[8] Terry Nichols stood trial in federal court in Colorado, and the jury found him guilty of involuntary manslaughter in the deaths of eight federal agents who died in the bombing. The jury could not reach a unanimous decision on the penalty for Nichols, and in June 1998, Judge Richard Matsch sentenced Nichols to life in prison without the possibility of parole. In May 2004, Nichols was found guilty on 160 counts of first-degree murder in Oklahoma, and again he received a sentence of life in prison without parole.[9] Timothy McVeigh, the mastermind of the bombing plot, was the first to stand trial. On June 2, 1997, a federal jury in Denver found McVeigh guilty of first-degree murder in the deaths of eight federal agents who died in the bombing. The jury recommended the death penalty for McVeigh, and he was executed on June 11, 2001.

How the trials came to take place in Denver appears to have much to do with the magnitude of the crime and the pervasive press coverage of the crime. Soon after prosecutors filed the initial charges against the defendants in federal court, the Western District of Oklahoma located in Oklahoma City, defense attorneys began to ask for the

recusal of Western District judges and a change of venue for the proceedings.[10] The defense claimed all judges in the Western District were themselves victims of the crime because their courthouse, which sat across the street from the Murrah Building, was damaged in the bombing. The defense also suggested that the sheer number of victims and the pervasive press coverage of the bombing in the Oklahoma City made it highly unlikely the trial court could find jurors who did not either know a victim or had not formed strong opinions about the defendants.[11]

The defense was partially successful in its initial request for a change of venue. On September 7, 1995, Judge Wayne Alley decided that the case would be tried in Lawton, Oklahoma, beginning in May 1996. Lawton was still within the Western District, but Judge Alley said the venue away from Oklahoma City would, "…provide a trial setting appropriate for detached and dispassionate deliberation."[12]

The defense did not give up efforts to remove the case from the Western District entirely, and they were successful in getting the Tenth Circuit Court of Appeals to consider their motions. The Tenth Circuit granted the defense motions, and on December 4, 1995, the court removed Judge Alley from the case and assigned it to Chief Judge of the Federal District Court in Colorado Richard P. Matsch.[13]

The first decision Judge Matsch would have to make would be whether to follow Judge Alley's order to hold the trial in Lawton or move the trial yet again. Following hearings that included expert testimony from jury consultants and media analysts, Judge Matsch issued an order on February 20, 1996, moving the trial to Denver.[14] In his order, Judge Matsch wrote that Oklahoma media had "demonized" McVeigh and Nichols and that the prejudice against the defendants was so great that it

necessitated a change of venue.[15] Prior to the bombing case, no Western District case had been moved to another federal court, and between 1980 and 1996, only about twelve federal cases had been granted a change of venue.[16]

Concerns about press coverage infringing on the defendants' rights to a fair trial led to judicial restrictions on information released about the case. Early on in the case, Western District judges ordered attorneys to file documents under seal that referenced evidentiary matters and payment of defense attorneys.[17] Judge Matsch continued the practice with modifications through his handling of the case.[18] The issue of sealed documents drew repeated protests from the press, the defense, and, in some instances, prosecutors.[19]

Judge Matsch exerted further control over information about the case by issuing two orders that limited the information attorneys in the case could provide to the press.[20] Prosecutors and defense attorneys accused each other of violating these orders repeatedly by allegedly leaking documents to the press or making comments to the press directly that violated the order.[21] McVeigh's lead attorney, Stephen Jones, said the orders limited his ability to combat negative publicity about his client. Jones presented the court with a plan to conduct a series of interviews between McVeigh and nationally known journalists. Jones's elaborate plan specified which journalists would have access to McVeigh, proposed a limited scope of questioning, and placed time restrictions on when the stories from those interviews could be published or broadcast. The plan also required journalists to agree to these stipulations. The court considered the request, but it never came to fruition.[22]

Perhaps the most unique feature of the bombing trials was the closed-circuit broadcast of the trials. After Judge Matsch ordered the change of venue to Denver, bombing victims began asking the court to provide a means of viewing the proceedings since many of them could not travel to Denver to attend the proceedings in person.[23] Furthermore, the Victims Assistance Office for the Western District of Oklahoma had identified more than 2,000 victims who wished to attend the proceedings, which made attendance for all practically impossible regardless of the venue.[24] The primary obstacle to a closed-circuit broadcast came from Rule 53 of the Federal Criminal Code and Rules that banned cameras and microphones in federal criminal courts, and Judge Matsch stated he would not make an exception to the rule.[25]

The prospect of a closed-circuit broadcast gained little traction until federal lawmakers took up the issue. In the spring of 1996, Oklahoma's congressional delegation led an effort to provide a means of closed-circuit viewing for federal trials through legislation.[26] The legislative vehicle was the Antiterrorism and Effective Death Penalty Act of 1996.[27] The act contained a provision that required federal courts to provide a closed-circuit broadcast of trials moved more than 350 miles on a change of venue. President Bill Clinton signed the act on April 24, 1996.[28]

The passage and signing of the Antiterrorism Act put federal law at odds with federal court rules. It also raised the issue that if the courts complied with the law, they would establish a forum to which the press and public could seek access. Judge Matsch eventually did allow for a closed-circuit broadcast of the trials open to court-recognized victims, rescue workers who worked at the bombing site, and court personnel, but the

press and the public were banned.[29] This was the first, and to date the only, federal trial conducted with a live closed-circuit broadcasting of the proceedings.

The fair trial/free press issues of venue, pretrial publicity, and closed-circuit broadcasting were three of the most important issues facing the court and the press in the prosecution of the Oklahoma City bombing cases. In deciding how to handle these issues, the courts looked to precedent established through previous cases in which the First and Sixth Amendments met with conflict. The conflict is almost as old as the Constitution itself, and it took almost two centuries for the Supreme Court of the United States and other courts to establish the laws, procedures, and protocols that would be employed in the Oklahoma City bombing trials.

Fair Trial/Free Press: Clashes Between the First and Sixth Amendments

The First Amendment right to free speech and a free press and the Sixth Amendment right to a fair trial are three of the American people's most closely held fundamental liberties. However, these three liberties often come into conflict with each other. The press has a right and an obligation to inform citizens about the workings of their government, including the court system. The press also has a right and an obligation to inform citizens about crimes that have happened in their communities. The publicity created in reporting these events may pose a risk to the defendant's right to a fair trial. Pretrial publicity may influence potential jurors such that they are not able to set aside opinions they may have formed about the defendant and judge the case solely by the facts in evidence. Also, press activities during the trial, such as the presence of cameras in the courtroom, may be disruptive to the court or intimidating to jurors, further hampering efforts to make the trial as fair as possible for the defendant. These

are but two of the concerns courts in the United States have had to deal with over the years. The courts have also wrestled with whether or not the press and the public have a constitutionally protected right to attend trials at all. If so, under what conditions might the press and the public be barred from the courtroom?

Early Fair Trial/Free Press Issues. One of the first cases to reveal a clash between the First and Sixth Amendments came less than two decades after ratification of the Constitution. The case involved a controversial and well-known public figure, former Vice President Aaron Burr, who stood accused of treason. Specifically, the United States charged Burr with plotting to form a new nation in territory shared by Spain and the United States. A former Vice President charged with treason would certainly attract media attention at any time, and it certainly did so in 1807 when Burr came to trial.[30]

Supreme Court Chief Justice John Marshall presided over the trial in Virginia, and he was well aware of the extent to which newspapers had discussed the case and how well informed the public was about the case. To counter this, Marshall undertook a lengthy and thorough *voir dire*, which is the process of questioning potential jurors to determine their ability to judge the case fairly. Marshall said there was a difference between impressions and opinions. Impressions were lightly held and might be changed by evidence presented during trial. Potential jurors with impressions about the case could be reasonable jurors. On the other hand, opinions were stronger, and they were less apt to change, thus potential jurors with opinions about the case should be excused.[31]

Marshall recognized the influence pretrial publicity could have on potential jurors. His definitions of impressions and opinions and his prescriptive measures for discerning between the two would serve as the first guidelines for negotiating fair trial/free press issues.[32]

The next case to address pretrial publicity and juror bias was the appeal of Mormon leader Brigham Young's personal secretary, George Reynolds, who had been convicted of polygamy and other crimes. In *Reynolds v. United States* (1879), Chief Justice Morrison R. Waite extended Marshall's reasoning from the Burr trial, and Waite offered two more points to consider. Like Marshall, Waite noted the difference between what he called light opinions and firm opinions. He said thorough *voir dire* could help the courts make the distinction between the two and eliminate potential jurors with firm opinions. Next, Waite said appellate courts should show great deference to the original trial courts when considering accusations of juror bias. Finally, Waite said it was up to the defendant's attorney to prove any individual juror was biased and not fit to serve.[33]

For more than eighty years, the guidelines established by the Burr case and *Reynolds* served as the prescriptive guidelines for judges seeking to empanel unbiased juries in cases that received heavy publicity in the press. Then, beginning in the 1950s, the Supreme Court took on a series of cases that would establish the fair trial/free press precedents followed by the courts to this day. The development of these precedents during the remainder of the twentieth century establishes a historical understanding and context for how fair trial/free press issues impacted the prosecution of the Oklahoma City bombing defendants.

Shepherd v. Florida. Supreme Court Justice Felix Frankfurter wrote that *Shepherd v. Florida* (1951)"…presents one of the best examples of one of the worst menaces to American justice."[34] With that statement, the Court overturned the rape convictions and death sentences of four African-American men in Florida accused of raping a white woman at gunpoint. The appeal to the Supreme Court focused on pretrial publicity in the case that led to violence, a call-out of the National Guard, and a jury verdict the Court said "[did] not meet any civilized conception of due process of law."[35]

Shortly after the arrest of the suspects, newspapers and radio broadcasts reported the suspects had confessed to the crime. While the reported confessions were not presented at trial, the Court noted that numerous witnesses and juror candidates said they had heard of the confessions. The Court reasoned that knowledge of these alleged confessions could only have come from the press.[36]

Press reports of the crime inflamed emotions in the community, leading to violence. The county sheriff moved the suspects to a prison to await trial after a mob surrounded the jail one night calling for the sheriff to turn the men over to the mob. Later, another mob burned the house of one defendant's parents and those of other African-Americans, causing many to flee the town, and the governor had to send the National Guard to restore order. Area newspapers covered these acts of mob violence with headlines such as "Night Riders Burn Lake Negro Homes."[37] It was in this climate that the case came to trial and ended with convictions and death sentences.[38]

The Court noted that the judge in the case denied defense requests for a continuance and a change of venue – both attempts to escape the highly charged

emotions in the community. However, in the decision to reverse the convictions and sentences, Justice Frankfurter laid substantial blame at the feet of the press:

> But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated.[39]

Through *Shepherd v. Florida*, the Court had shown the First Amendment rights of the press could not trample the Sixth Amendment rights of defendants. Reflecting on the decision, Whitebread and Contreras wrote, "[T]he Court demonstrated a commitment to preserving the fair trial rights of the defendant, yet it failed to define any limitations."[40] Defining those limitations would become the focus of the Court in the 1960s.

Irvin v. Dowd. Ten years after *Shepherd v. Florida*, the Court was presented with another case in which intense media attention appeared to have tainted the jury pool. In this case, the jurors themselves said they had followed press reports of the crime, and they had formed strong opinions about the guilt of the accused, and, yet, many of these people were allowed to serve on the jury. The case came to the Supreme Court as *Irvin v. Dowd* (1961).[41]

In April 1955, Indiana police arrested Leslie Irvin as a suspect in six murders that took place near Evansville, Indiana, from December 1954 through March 1955. Press coverage of the crimes was intense both during the crime spree and following Irvin's arrest. Irvin's attorneys were successful in getting a change of venue for the trial,

but only to a neighboring county where potential jurors had been exposed to much of the press coverage of the crimes and the arrest.[42]

Jury selection for the Irvin trial proved to be an arduous process. A panel of 430 people presented themselves for *voir dire*. Initial questioning resulted in 268 people being excused for cause because they expressed fixed opinions about Irvin's guilt. Once a jury was seated, eight of the twelve jurors had admitted they thought Irvin was indeed guilty, but they still thought they could judge the case fairly. The Supreme Court disagreed.[43]

Justice Tom Clark wrote the opinion vacating Irvin's conviction and sentence. Justice Clark noted that there was no simple formula for seating an impartial jury in any case. He also noted the impracticality of requiring jurors to have no knowledge of the case at all. Clark wrote:

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.[44]

In considering press attention given to the case, the Court noted evidence of extensive coverage given to the case and the expansive reach of the press. Newspapers that covered the case reached 95% of the homes in the county where the trial took place. The Court considered broadcast coverage almost equally as expansive.[45]

Press reports about the crimes included accounts of Irvin's previous convictions, including a juvenile conviction, and more than one report of alleged confessions. One of

those confession stories appeared on the eve of the trial. Concerning the press attention prior to trial, Clarke wrote, "Here the build-up of prejudice is clear and convincing."[46]

The Court concluded that the impact of press coverage on jurors was inescapable and insurmountable.[47] The Court noted that two-thirds of the jurors who convicted Irvin and sentenced him to death had admitted in *voir dire* that they thought Irvin was guilty. Some of those who sat on the jury went as far as to say they would need evidence of Irvin's innocence to change their minds. With these facts in mind, the Court unanimously vacated Irvin's conviction and sentence. The Court said jurors may have been sincere in their attempts to serve as impartial jurors, but the evidence of such strongly held opinions about the case prior to trial indicated those opinions could not likely be set aside. In conclusion, Clark wrote:

> With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.[48]

In a concurring opinion, Justice Frankfurter took particular note of the role the press played in the case, reminiscent of his opinion in *Shepherd v. Florida*:

> This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system – freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.[49]

Frankfurter's opinion noted the frequency with which cases involving the clash between the First and Sixth Amendments were reaching the Court. It also suggested some frustration the Justices seemed to be feeling about such cases. That frustration would come to a head just five years later with a landmark case known as *Sheppard v. Maxwell*.

Sheppard v. Maxwell. The case known as *Sheppard v. Maxwell* (1966) was the appeal of an Ohio physician named Sam Sheppard, convicted of murdering his wife in 1954. The case was a media sensation around the Cleveland, Ohio area and eventually all across America from July 1954 until Sheppard's conviction in December 1954.[50] Later, the Sheppard case would serve as the inspiration for a popular television series and a motion picture both titled "The Fugitive." The Sheppard murder case provided plenty of fodder for the news media and later the entertainment media, and it was this intense media attention that served as the basis for the appeal.[51]

The Supreme Court ruling in *Sheppard v. Maxwell* was a landmark decision. The opinion written by Justice Tom Clark not only addressed the fair trial/free press problems present in the case, but also it set forth remedies for those problems.[52] It was a defining moment in the evolution of fair trial/free press legal theory that had been building since *Shepherd v. Florida* more than a decade earlier, and the legal community immediately took notice.[53] The remedies and suggestions set forth in the *Sheppard v. Maxwell* opinion would serve as the basis for the America Bar Association ethical guidelines for judges, attorneys, and reporters adopted shortly after the decision. These guidelines became a cornerstone of high profile case management in the years since.[54]

Dr. Sam Sheppard was a physician in the Cleveland, Ohio, suburb of Bay Village, who was charged with murdering his wife, Marilyn, on July 4, 1954. Sheppard claimed a mysterious man broke into their home and beat his wife to death while Dr. Sheppard was asleep in another room. Sheppard said he chased the mystery man from the house and fought with him on the beach behind the house before the man knocked Sheppard unconscious and escaped. Sheppard's prominence in the community, the brutality of the crime, and the sensational story of the mysterious suspect fueled intense press coverage.[55]

The trial of Dr. Sam Sheppard in October 1954 was nothing short of a media spectacle. The lengths to which the trial court went to accommodate members of the press drew some of the sharpest criticism from the Supreme Court. The press essentially took over the courtroom and the courthouse where the trial took place. The press corps had its own table inside the well of the courtroom, a space usually reserved only for the judge, the defendant, attorneys, and jurors. One broadcast station was allowed to set up a studio next door to the jury deliberation room from which reporters broadcast updates even as the jury was deliberating. Members of the press had priority seating in the courtroom with Sheppard's family relegated to a backbench, and the public could only get access with special passes and only when there was a seat vacated by an absent reporter.[56]

Particularly problematic was the potential influence this whirlwind of press activity had on jurors. During *voir dire*, all but one juror admitted to reading or hearing about the case. The judge did not sequester the jury, and he seriously admonished jurors to avoid press coverage about the case only once early on in the trial. Jurors had their

pictures taken and their names and addresses published multiple times, and some jurors admitted that community members had contacted them offering opinions on the case.[57]

In the clash between the First Amendment and the Sixth Amendment present in the Sheppard case, the First Amendment trumped the Sixth Amendment. Justice Clark's opinion stated, "…every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public."[58] Clark went on to detail specific tools trial judges had at their disposal to mitigate the influence of press coverage.

The Court noted that both the judge and the prosecutor were running for re-election at the same time the trial took place. The Court said the judge should have considered delaying the trial until after the election. The judge also should have considered a change of venue and sequestration of the jury to prevent them from exposure to prejudicial coverage during the trial itself.[59]

The Court said the judge should not have allowed the press to have free reign in the courtroom and the courthouse. It was within the judge's powers to limit the number of press members in the courtroom, and it was within his powers to place parameters around their actions in the courtroom and the courthouse. Once it became apparent that the comings and goings of the reporters were disruptive to the courtroom, the judge could have implemented restrictions to preserve decorum.[60]

Finally, the Court said the judge should have instructed court personnel, attorneys, and investigators not to make any statements regarding facts not in evidence. While the judge could not have imposed similar restrictions on the press, he could have

strongly warned those who reported speculative information of the jeopardy such reports posed to the prospects of a fair trial. Justice Clark wrote:

> Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom – not pieced together from extrajudicial statements.[61]

The lasting importance of *Sheppard v. Maxwell* is that the Supreme Court ruling on the case set out several guidelines for courts to use in jury selection and case management in an effort to avoid or reduce the chances that pretrial publicity might taint the jury pool.[62] Five of the most often cited prescriptive measures from the Sheppard decision are: (1) Courts have the ability to limit statements made by court personnel and law enforcement, and the court should exercise this ability. (2) The court can delay the trial until media attention dies down. (3) The defense may ask for a change of venue. (4) *Voir dire* should be thorough, and it should focus on pretrial publicity in cases that have drawn intense media attention. (5) The court can sequester the jury to prevent jurors from being influenced by the media or others outside the case.[63]

Following the Sheppard case, the American Bar Association revised its ethics standards for attorneys and published a list of voluntary guidelines for the courts and the press when dealing with high profile cases. These guidelines include a list of things the press should not do. Chief among those press proscriptions are: The press should not report (1) confessions made by the defendant, (2) prior convictions or criminal records of the defendant, (3) the results of physical or psychological tests relevant to the case,

(4) nor speculate on the defendant's mental status at the time of the crime. These guidelines are voluntary, and the press has no obligation to follow them; however, they have been implemented to various degrees by judges managing high profile cases, and they had their beginnings in the landmark decision in *Sheppard v. Maxwell*.[64]

The Manson Family Murders. Three years after the Supreme Court's *Sheppard v. Maxwell* decision, a California murder case presented an exceptionally high-profile case in which to apply some of the provisions outlined in the Court's *Sheppard* opinion and the A.B.A. Guidelines. The case was the infamous Manson family murders, also known as Tate-LaBianca murders. The Tate-LaBianca murders had all the elements needed to inspire sensational media coverage. There were seven victims, one of whom was a beautiful and well-known actress pregnant with the child of a film director. The brutality of the murders shocked even the most jaded of investigators, and it all appeared to be the work of a deranged, cultish leader and his followers.[65] The fact that the murders happened right on the doorstep of Hollywood only intensified the massive press attention.

The Tate-LaBianca murders were two separate crimes that investigators first thought were unrelated. The first of these murders occurred on August 9, 1969. The victims were actress Sharon Tate, celebrity hair stylist Jay Sebring, coffee heiress Abigail Folger, Viotyck Frykowski, and Steve Parent, all found dead at a house rented by film director Roman Polanski who was Tate's husband. Polanski was working in Europe at the time. The crime scene was gruesome. Bodies were strewn about the house, the yard, and the driveway. All of the victims had been stabbed multiple times,

and some had been shot. The killers used the victim's blood to write the word "PIG" on the door before leaving the house.[66]

The second crime happened on August 10, 1969 when Leon LaBianca and his wife were murdered in their home a few miles from the first crime scene. The LaBiancas were also stabbed numerous times. Again, the killers scrawled a message in the victim's blood. This message would become the moniker for the case – "Helter Skelter."[67]

After months of investigation, Los Angeles police identified their suspects. What the press learned about the suspects only added to the already bizarre story. The suspects were a rag-tag bunch of young drifters looking to find life's meaning through drugs and promiscuity. While such a group was not unheard of in the turbulent late-1960s, this group had the misfortune of falling under the spell of a small time burglar and want-to-be music star whose grandiose ideas had turned to the extremes of violence. He had become the messianic leader of the cult-like group, and his name was Charles Manson. The suspect list included Manson, Susan Atkins, Linda Kasabian, Patricia Krenwinkel, Leslie Van Houten, and Charles "Tex" Watson. Manson, Atkins, Krenwinkel, and Van Houten would stand trial together in July 1970.[68]

After indictment of the suspects, Judge William Keene issued a gag order. The judge was well aware of the intense media focus on the trial, and he wanted to do what he could to keep information under control in hopes of seating an impartial jury. In his book *Helter Skelter,* prosecutor Vincent Bugliosi noted a comparison with the Sheppard case:

> [O]wing to the incredible amount of pretrial publicity – a *New York Times* reporter told me that already it far exceeded that given the first Sam Sheppard trial – Judge Keene, without consulting our office, now went ahead and issued a detailed publicity order. Later amended several times, it would run to a dozen pages. In essence, it forbade anyone connected with the case – prosecutors, defense attorneys, police officers, witnesses, and so forth – to discuss the evidence with any representative of the media.[69]

Bugliosi wrote that the order was violated several times prior to jury selection, but generally it appeared to have met its purpose. The court was able to seat a twelve-member jury and six alternate jurors after an extensive five-week *voir dire*, during which 205 candidates answered questions about their ability to serve. Many of the questions focused on the amount of media coverage surrounding the case, but all who ultimately sat on the jury said they could, and would, judge the case by the evidence presented at trial.[70]

To further insulate the jury, the trial judge, Charles Older, had the jury sequestered for the duration of the trial. Each day, jurors traveled from their hotel to the courthouse on a special bus with the windows blacked out so they could not be seen nor could they see any signage, newspaper racks, or demonstrations that might have taken place outside the courthouse.[71]

The press covered the prosecution of the case as thoroughly as they had the investigation that preceded it. During the trial, two major events thrust First Amendment rights and Sixth Amendment rights into conflict; however, these two events were not directly related to reporters covering the case from the courtroom. Still,

both incidents had the potential to contaminate the jury and threaten the defendants' rights to a fair trial.

The first incident happened only a few days after Judge Keene had implemented the gag order. On the morning of Sunday, December 14, 1969, *Los Angeles Times* readers opened their papers and read the headline, "SUSAN ATKINS' STORY OF 2 NIGHTS OF MURDER."[72] Prior to the gag order, Atkins and her attorney had arranged to have a European press syndicate publish her description and explanation of the crimes. Atkins reportedly received $80,000 for her story.[73] It is still disputed exactly how the *Times* got the story, but, nonetheless, within two days of publication in Europe, the story appeared on the front-page of the *Los Angeles Times*.[74] A paperback book based on the Atkins account soon followed. All of this happened before jury selection began. Prosecutor Bugliosi recalled these publications as a major threat to the case:

> Whatever the ethics of the whole matter, the Atkins story created immense problems, which would plague both the defense and the prosecution throughout the trial ... It was felt by some that the Atkins revelations would make it impossible for the defendants to obtain a fair trial ... [W]e were all too aware, from the moment the story broke, that finding twelve jurors who hadn't read or heard of the account, and then keeping any mention of it out of the courtroom itself, would be a difficult task.[75]

The second incident sprang from an incriminating comment made by none other than the President of the United States. On August 3, 1970, with the trial of the first four defendants barely a week old, President Richard M. Nixon gave a speech at a national law enforcement convention in Denver, Colorado. During the speech, President Nixon

pointed out what he found to be a particular problem in press coverage of crime – the glorification of people who committed crimes. President Nixon, an attorney prior to entering politics, pointed to the ongoing Manson trial as a case in point:

> I noted, for example, the coverage of the Charles Manson case … front-page everyday in the papers. It usually got a couple of minutes in the evening news. Here is a man who was guilty, directly or indirectly, of eight murders. Yet here is a man who, as far as the coverage is concerned, appeared to be a glamorous figure.[76]

Bugliosi said he learned of the statement from reporters during a midday recess, and attorneys from both sides met with trial judge Charles Older in chambers to discuss the implications. The defense wanted to *voir dire* jurors immediately, but Judge Older held off. Jurors were already restricted from reading newspapers and receiving broadcast news during their sequestration; therefore they should have been shielded from hearing about the President's comments. Judge Older did take two precautionary measures, however. He ordered bailiffs to keep the lone television at the jurors' hotel turned off that night. He also banned attorneys from bringing newspapers into the courtroom from that day forward, lest a juror should catch sight of a headline about the President's speech that might follow in the coming days.[77]

Judge Older's plan was foiled, however, by Charles Manson himself. The following day, defense attorney Daye Shinn pulled a newspaper out of a bailiff's file cabinet to check the sports page, and he left the paper on the defense table. He later claimed he was unaware the front-page was still attached to the paper. Just as the court was breaking for lunch, Manson grabbed the paper, stood, and held the paper above his

head, showing the jury the headline, "MANSON GUILTY, NIXON DECLARES."[78] Judge Older was furious, and when the jury returned, he conducted *voir dire* to see if the spectacle had any impact on the jurors. To a person, the jurors said the headline had no impact on them, and they could continue judging the case on the evidence presented in court alone. Shinn admitted to his mistake the next day, but Judge Older did not show any leniency. The judge found Shinn in contempt of his order against bringing newspapers into court. Shinn spent the next three days conducting the defense in the courtroom and the next three nights serving a contempt citation in the county jail.[79]

The Manson trial ended in convictions for all of the defendants. Despite massive publicity, a confession story published around the world, and claim of guilt made by the President of the United States, the convictions stood. The trial court had used several of the tools prescribed in the *Sheppard v. Maxwell* opinion and had managed to effectively prosecute one of the most notorious crimes in American history. The gag order, though occasionally violated, appeared to have kept leaks to a minimum. The extensive *voir dire*, focusing in part on press coverage, produced a jury and alternates able to judge the case by the facts. Sequestration of the jury once testimony began further prevented jury contamination. Finally, the second *voir dire*, following Manson's display of the President Nixon headline, foreclosed what almost certainly would have been grounds for an appeal had Judge Older not taken such action. In these respects, the Manson case showed judges and attorneys how to use the tools at their disposal to manage a highly publicized case.[80]

If the Sheppard case showed the dangers of a judge throwing up his hands and allowing the press to run amok, the Manson case showed how a judge could take the

reins and guide a course between the often conflicting issues of fair trial versus free press. But could a judge go too far and use an iron fist approach to squash First Amendment freedoms of the press? That was the issue the Supreme Court faced in another landmark case known as *Nebraska Press Association v. Stuart*.

Nebraska Press Association v. Stuart. The crime at the center of *Nebraska Press Association v. Stuart* (1976) had many of the elements of a crime sure to attract press attention. There were multiple murder victims, including children. Some of the victims had also been sexually assaulted. Another intriguing aspect of the crime was its location. Instead of a mass murder in the glamorous Hollywood hills, as was the case in the Tate-LaBianca murders, this crime happened in the pastoral setting of a small, isolated town in western Nebraska. The setting for the crime was a crucial element in the events of the case that would ultimately reach the Supreme Court, culminating in one of the most important fair trial/free press cases in American history.

Sutherland, Nebraska, sits on the vast plains of western Nebraska. In 1975, the town boasted 850 residents, and on the night of October 19, 1975, many of them were shocked to learn that six of their fellow townsfolk had been shot and killed by one of their own.[81] Charles Edward Simants was no stranger to law enforcement in Lincoln County. He had a string of small crimes to his name dating back to his teen years, and many of them were related to his penchant for alcohol. No one at the Rodeo Bar in Sutherland was surprised to see Simants there drinking from the afternoon into the evening of October 19, but everyone was likely shocked at what he did next.[82]

After leaving the bar, Simants went to his sister's and brother-in-law's house where he had been living, took a .22 rifle from a closet, and went next door to the Kellie

home. There he shot and killed Henry and Marie Kellie, their adult son David, and Henry and Marie's three grandchildren, Florence, Deanne, and Daniel. Simants also sexually assaulted Marie Kellie and Florence after shooting them.[83]

Following the murders, Simants went back home, wrote a note confessing to the crimes, and called his parents by phone confessing to them too. Simants's parents alerted police, but Charles Simants was gone when officers got to the house. As if nothing had happened, Simants walked back to the bar, drank two more beers, and then wandered off into the night as the nightmare of his crime settled in on Sutherland.[84]

Police found Simants early Sunday morning and took him to the Lincoln County jail in North Platte just fifteen miles from Sutherland. By now reporters from across Nebraska and across the nation knew about the crime and the confession Simants had made. They flocked to the Lincoln County courthouse for a rare Sunday arraignment. The local press and even the NBC broadcast network would report on the arraignment and the confessions before day's end. It was in this environment that judges and attorneys assigned to the case – most of whom had no experience with murder trials – began to worry about what all of the press attention might do to Simants' prospects for receiving a fair trial.[85]

The judges and attorneys handling the Simants case had a legitimate concern. Lincoln County had so few people and publicity about the crime had been so great that it was safe to assume anyone who would be called as a potential juror had most likely heard something about the case. With this in mind, Simants's attorneys approached Judge Ronald Ruff with a request for a gag order. Judge Ruff issued the order, and the

press immediately and vehemently objected, for it was an order like no one remembered seeing before. The judge's order was a gag on the press.[86]

The gag order originally drafted by Ruff went through revisions by the trial judge and the Nebraska Supreme Court, which upheld the order with modifications. Still, the effect of the order remained the same throughout revisions and appeals. The press was prohibited from reporting almost anything that happened in open court prior to the seating of a jury. Furthermore, journalists could report that a gag order was in place, but they could not report specifics of the order. Reporters were left in a position where they could tell their audiences that they could not speak, but they could not tell their audiences why.[87]

The court used the voluntary trial coverage guidelines from the Nebraska Bar Association (adopted from the A.B.A. ethics rules for attorneys and influenced by *Sheppard v. Maxwell*), tailored them specifically to the Simants case, and made them obligatory by order of the court. The court defined pretrial publicity as any reporting that would take place before the seating of a jury. This meant reporters could attend open court sessions, and they could examine public documents related to the case, but they could not report what they observed. Specifically the court banned reporting on statements Simants made to police and the confessions Simants made on the night of the crime. All of these statements had already been reported prior to the gag order. The press could not report expert forensic testimony given in pretrial proceedings in regard to the sexual assaults, and finally the press could not report on the specifics of the gag order itself. Attorneys for the press failed in all of their appeals, and it was left to the Supreme Court to decided if the Nebraska courts had gone too far in protecting

Simants's Sixth Amendment rights and thus abridged the First Amendment rights of the press.[88]

The Supreme Court decision in *Nebraska Press Association v. Stuart* was unanimous. The Court was sympathetic to the intent of the Nebraska court's order, but the justices of the High Court determined that the order that had indeed gone too far. Writing the opinion of the Court, Justice Warren Burger stated, "…pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial."[89] However, in trying to mitigate the potential impact of such publicity, the Court said the Nebraska judges did not fully explore the alternatives outlined in *Sheppard v. Maxwell*, such as a change of venue, delaying the trial, conducting thorough *voir dire* about press coverage, instructing jurors to consider only evidence presented in the courtroom, and sequestering the jury.[90] The Court also pointed to the fact that the ban applied to press organizations based outside Nebraska and thus outside the trial court's jurisdiction. Finally, the opinion focused on the issue of allowing the press to attend open hearings, but restricting the press from reporting on those hearings. The Court considered this an unjustifiable prior restraint. Justice Burger wrote, "To the extent that this order prohibited the reporting on evidence adducted at the open preliminary hearing, it plainly violated settled principles: '[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom.'"[91]

The *Nebraska Press Association* case left judges with a three-part test to help guide them in the use of gag orders. Judges should only issue gag orders if three conditions are met. First, there must be a real danger that the release of information will impact the defendant's rights to a fair trial. Second, implementation of the gag order

must be shown to reduce the danger posed. Third, it must be shown that less severe measures (i.e. change of venue, delay of trial, careful *voir dire*, etc.) will not reduce the danger.[92] The Court had made it clear through *Nebraska Press Association* that imposing restrictions on the press was a last option for trial judges and that option could not be exercised when other options exist.[93]

Scherer noted the importance and the legacy of the *Nebraska Press Association* decision:

> Despite the lingering ambiguity regarding the viability of pretrial gag orders in other cases, the announcement of the *Nebraska Press Association* decision left two matters quite clear: the order entered by the Nebraska courts in the Simants litigation had been unanimously rejected by the High Court, and the presumptive unconstitutionality of all such prior restraints of the press had been strongly reiterated. Under any interpretation of the justices' various opinions, the net result was a significant victory for First Amendment advocates in general and for the Nebraska media petitioners in particular. They and the rest of the national press quickly took notice of their accomplishment.[94]

In a footnote of the *Nebraska Press Association* decision, Justice Burger wrote, "Closing of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies. We are not now confronted with such issues."[95] But that was exactly the issue that would come before the court in a series of cases in the late 1970s and the 1980s. In a sense, the move to limit press access to the courtroom was the logical next step for judges concerned about

pretrial publicity.[96] If they could not prohibit the press from reporting what happened in the courtroom, they could simply lock the courtroom doors.

Richmond Newspapers, Inc. v. Virginia. Such a situation presented itself in *Richmond Newspapers, Inc. v. Virginia* (1980). The case behind *Richmond Newspapers* was a murder case, but it was not a case as highly publicized as the Sheppard, Manson, or Simants cases. The defendant in the case was John Paul Stevenson, who was charged with murdering a Virginia hotel manager in 1975. In 1976, a Virginia jury convicted Stevenson of second-degree murder, but the conviction was overturned on appeal due to improperly admitted evidence. Stevenson's second trial ended in a mistrial when a juror asked to be excused and the court had no alternate jurors for replacement. Stevenson's third trial also ended with a mistrial when the court discovered that one juror had learned about Stevenson's case from press reports and that juror talked to other jurors about what he knew. Finally, a fourth jury was seated in September 1978, and just before testimony was to begin, Stevenson's attorneys asked Judge Richard H.C. Taylor to close the trial to the press and the public. Stevenson's attorney said he was concerned that a family member of the victim who was present in the courtroom might relay information about testimony to witnesses. Prosecutors did not object to the request, and Judge Taylor cleared the courtroom.[97]

Judge Taylor found justification for closing the trial in a Virginia law providing for judicial discretion that stated judges could exclude "from the trial any person whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."[98] Two reporters for Richmond Newspapers, Inc. objected, and Judge Taylor agreed to conduct a hearing after the day's testimony. Judge

Taylor further stated that the hearing on the closure order was considered part of the trial, and so the hearing was conducted in a closed courtroom with only media counsel, defense counsel, prosecutors, Judge Taylor, and court personnel present. Again, Judge Taylor stood by his order, and the remainder of the trial would be closed.[99] Day two, however, would be the final day of the trial. After prosecutors presented their evidence (apparently insufficient evidence), the defense moved to strike the evidence and declare Stevenson not guilty. Judge Taylor granted the motion, and the fourth and final trial of John Paul Stevenson ended with Stevenson leaving the courthouse a free man.[100]

Richmond Newspapers Inc. advanced its appeal, and that appeal finally reached the High Court in 1980. It was left to the Supreme Court to decide the important question presented in *Richmond Newspapers, Inc. v. Virginia*: Does the Constitution guarantee the public and the press the right to attend criminal trials? In answer to that question, the Court looked first to history. Public attendance at trials as a historical practice dates back to pre-Norman England through what was called the "Rule of Publicity."[101] The rule required all free men to attend trials of their peers that took place in their communities. The rationale underlying the rule was that the witness of all free men in the community would affirm the punishment meted out in the case of a guilty verdict or it would equally affirm the innocence of the accused in the case of an acquittal. Over time, the Rule of Publicity gave way to voluntary and discretionary attendance, but it established a historic precedent for public attendance at trials and the right for defendants to face their accusers in a public forum that would carry over to the courts of Colonial America and on through the founding of the United States. In the *Richmond Newspapers* decision, Justice Warren Burger wrote, "…the historical

evidence demonstrates conclusively that, at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open."[102]

Next, the Court noted the value to society in allowing for open observation of its institutions. The Court also said that in modern society the press played an important role as a proxy for individuals who could not observe institutions such as the courts for themselves. Finally, the Court considered the need to preserve public forums:

> A trial courtroom also is a public place where the people generally – and representatives of the media – have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.[103]

The Court concluded by making note of the fact that Judge Taylor had not considered any alternatives before issuing his closure order. The Court pointed to the alternatives listed in *Nebraska Press Association* and *Sheppard v. Maxwell* as options to consider before issuing a closure order. The opinion concluded with the statement, "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[104]

Justice William Rehnquist was the lone dissenter in *Richmond Newspapers*. In his *Richmond Newspapers* dissent, Rehnquist referred back to his opinion in a case the Court ruled on one year earlier in which he said the right to a public trial rests with the defendant, and if the defense and prosecution agree to a closed court, the judge may grant their request.[105] Rehnquist wrote that he found nothing in the First and Sixth Amendments to prevent closed trials when the adversarial parties agree to such an arrangement.[106]

The result of *Richmond Newspapers* was a presumed openness for criminal trials, but not an absolute right for public and press attendance at criminal trials.[107] Parkinson and Parkinson called this, "… a qualified and limited right of access for the press to criminal trials."[108] The Court's opinion did leave the door open for some possible exceptions in cases where the state might be able to show an overriding interest restricting access to trials. Finally, the *Richmond Newspapers* decision did not address other types of court proceedings such as pretrial hearings and *voir dire*. Those issues would be the focus of a quartet of cases that began in the late 1970s and extended through the 1980s.

Gannett Co. v. DePasquale. The year before *Richmond Newspapers* came to the Supreme Court, the justices considered a case involving the closure of a pretrial hearing on evidence suppression. The case was known as *Gannett Co. v. DePasquale* (1979). The crime at the center of the case was the 1976 murder of a former police officer in upstate New York. Prior to trial, the two defendants made a motion to suppress some of their statements made to police and some of the evidence (specifically the murder weapon) collected under questionable police practices.[109] The defense asked the judge to close the hearing to the press and the public, claiming that publicity up to that point had already jeopardized the defendant's chances at receiving a fair trial. Furthermore, the defense claimed that if the suppression motion succeeded, news reports about the hearing would disclose the evidence to be withheld, and thus the publicity would defeat the purpose of the suppression order. Prosecutors did not object to the closure request, and the judge granted the closure order.[110]

Press appeals were unsuccessful, and the case reached the Supreme Court in 1978. It was decided in 1979. The decision in *Gannett Co. v. DePasquale* was a 5-4 majority, and the different lines of reasoning taken by the justices made for a convoluted ruling. In the end, however, the majority stated that the Sixth and Fourteenth Amendments do not give the press and the public the right to attend trials. The *Gannett* decision may appear contradictory and confusing when juxtaposed with the decision reached in *Richmond Newspapers* just a year later. However, it is important to note that the scope of the *Gannett* decision was limited to pretrial hearings, and, more specifically, a suppression hearing. Furthermore, the denial of access was imposed only temporarily before the trial, and the court did release transcripts of the proceedings later.[111] In such a case, the majority said protecting the defendant's rights to a fair trial took precedence over public access.[112]

Globe Newspaper Co. v. Superior Court. Globe *Newspaper Co. v. Superior Court* (1982) was a press challenge to a Massachusetts law that barred the press and public from the courtroom during testimony from minor victims of sex offenses. In the case, a Massachusetts judge denied press appeals and closed the court during the testimony of three teenage rape victims. The court found this blanket closure law unconstitutional. In Justice Brennan's opinion, he wrote:

> Where … the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.[113]

The Court reversed the closure order of the Massachusetts judge because the order was not narrowly tailored. The Court did allow that protecting minor victims of sex crimes could be a compelling state interest warranting closure; however, judges would have to consider the specifics of each case and tailor closure orders to the specifics of the case before closing their courtrooms to the public and the press.[114]

Press-Enterprise I and *Press-Enterprise II*. A pair of cases originating in California known as Press Enterprise I and Press Enterprise II considered the openness of *voir dire* and preliminary hearings respectively. *Press-Enterprise v. Superior Court of California for the County of Riverside* (Press-Enterprise I) was decided by the Supreme Court in 1984.[115] The facts of the case focused on the *voir dire* for a defendant accused of the rape and murder of a teenage girl. The California trial court had allowed the press to observe the general *voir dire* proceedings, but not the individual *voir dire* of potential jurors. The entire *voir dire* process was quite lengthy, lasting a total of six weeks, of which the press was able to observe only three days. The Supreme Court ruled that the exclusion of the press, barring the state's showing of an overriding interest, was unconstitutional. Again, the Court pointed to the long history of openness in the Anglo-American courts. The court also said openness is essential to preserving public confidence in the judicial system.[116]

Press-Enterprise II, *Press-Enterprise v. Superior Court of California for the County of Riverside*, came before the Supreme Court in 1986. In this case, the press objected to being barred from a lengthy, forty-one-day preliminary hearing for a nurse accused of murdering twelve patients using overdoses of medication.[117] The Court considered the closed preliminary hearing unconstitutional on the same grounds as

Press-Enterprise I. Specific to the purpose of the preliminary hearing, the opinion stated:

> [T]he absence of a jury, long recognized as "an inestimable safeguard against the corrupt or overzealous prosecutor … and against the compliant, biased, or eccentric judge," *Duncan v. Louisiana,*…makes the importance of public access to a preliminary hearing even more significant. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[118]

The line of cases beginning with *Nebraska Press Association* and extending through Press-Enterprise II established a presumption of openness for trials, preliminary hearings and *voir dire*. However, the courts may restrict press and public access in individual cases and for individual witnesses providing it meets the following criteria: The court must (1) find an overriding state interest, (2) show that closure is the only means of meeting that interest, (3) narrowly tailor the closure order to meet that interest, and (4) hold hearings on the record to prove the three criteria.[119]

Attorney Advocacy in the Press

The highly publicized cases that came before the Court in the last half of the twentieth century also focused attention within the legal community on professional ethics in such cases with fair trial/free press implications. The central question was how much should attorneys be allowed to say publicly regarding pending cases? The issue became a priority for the American Bar Association in the 1960s after a series of cases drew criticism from the Supreme Court regarding how attorneys conducted themselves in relation to the press prior to trial.[120] From the 1960s through the 1990s, the A.B.A.

would debate professional codes of ethics regarding attorney/press relations, but the literature shows such codes had been a part of American jurisprudence since the late nineteenth century.[121]

Early Professional Codes. The first known code of ethics to address attorney/press relations in the United States was the "Alabama Code of 1887."[122] The Alabama Code advised attorneys that they should not talk to journalists about pending cases. The code stated, "[n]ewspaper publications by an attorney as to the merits of pending or anticipated litigation ... tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice."[123] The American Bar Association first addressed the issue in 1908 with Canon 20. The canon stated a position similar to the Alabama Code, and it was used in the drafting of professional ethics codes in several states. Canon 20 read:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with the fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.[124]

Calls for Change. Canon 20 remained essentially untouched until the mid 1960s. By the mid-1960s though, the Supreme Court was growing increasingly frustrated by fair trial/free press cases, particularly those focusing on pretrial publicity.[125] Two cases

in particular brought the issue of pretrial publicity to a critical point causing many in the legal community to demand action.

The first case was the assassination of President John F. Kennedy in 1963. While the Supreme Court as a body did not have a role in investigating the case, Supreme Court Chief Justice Earl Warren headed the commission investigating the assassination. The commission's final report on the assassination was highly critical of the relationship between the Dallas Police Department and the press following the President's assassination.[126] The Warren Commission claimed police had given the press too much information about the accused assassin, Lee Harvey Oswald, and police had given the press too much physical access to Oswald. The commission claimed this flood of information and easy physical access to the suspect were partially responsible for the assassination of Oswald by Jack Ruby just two days after the president's murder.[127] The commission also suggested that so much information had been released in the two days between President Kennedy's assassination and Oswald's assassination that if was doubtful Oswald would have received a fair trial had he not been murdered.[128]

The Warren Commission's criticism of the police/press relationship in the Kennedy assassination led the American Bar Association to take action. In 1964, the A.B.A. formed a committee that would become known as the Reardon Committee.[129] The Committee was charged with the task of establishing professional standards for attorneys and law enforcement regarding public comments and the release of information in the pretrial stage of criminal proceedings.[130] The Reardon Committee

was working on developing these standards when the second significant case emerged in 1966. That case was *Sheppard v. Maxwell*.[131]

In *Sheppard v. Maxwell*, the Court was highly critical of the relationship between law enforcement, the court, and the press.[132] The Court determined that the trial judge had the authority to limit extrajudicial statements made by attorneys and law enforcement officers, and he should have exercised this authority to protect Sheppard's right to a fair trial.[133] The Court's endorsement of judicial control was one of the most important provisions in the *Sheppard* decision.[134] It was a landmark fair trial/free press ruling, and the Reardon Committee took notice.[135]

Model Code of Professional Responsibility. The Reardon Committee relied heavily on the language of *Sheppard* in drafting what would become known as the A.B.A. Model Code of Professional Responsibility.[136] The committee was looking for a legal standard to define the limits of speech, and it found that standard in the language of *Sheppard.* In the *Sheppard* opinion, Justice Clark wrote, "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."[137] Thus, "reasonable likelihood" of prejudicing the jury became the test for determining the limits of pretrial public statements.[138]

The American Bar Association adopted the Model Code of Professional Responsibility in 1969.[139] The code gave specific guidelines for what attorneys could and could not say publicly in the pretrial stage. The code stated:

> It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication in

> connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.[140]

The code provided guidelines for what attorneys could and could not discuss publicly. Items attorneys could discuss publicly included: (1) information that was part of public records, (2) confirmation that an investigation had begun and the general nature of that investigation, (3) general descriptions of physical evidence, (4) requests for assistance in collecting information or evidence, and (5) warnings to the public about any dangers they might face related to the case.[141] Items attorneys could not discuss publicly included: (1) a defendant's reputation, character, and criminal background, (2) negotiations for a plea agreement, (3) statements made by a defendant or his/her refusal to make statements, (4) the performance of and results of any tests, (5) witnesses who might testify in the case or the testimony they might offer, and (6) opinions about the case against the defendant, opinions about evidence in the case, and opinions about the guilt or innocence of the defendant.[142] The A.B.A. Model Code would become the basis for professional codes adopted in every state.[143] The Model Code would also be the basis for the voluntary press guidelines established by press and bar associations in several states.[144]

Less than a decade after adoption, the Model Code would come under scrutiny due to the Court's ruling in another landmark fair trial/free press case – *Nebraska Press Association v. Stuart*. In the *Nebraska Press Association* decision, the Court examined the trial judge's gag order targeting the press using the "clear and present danger"

test.[145] The opinion cited Justice Hand's definition of "clear and present danger" offered in *United States v. Dennis* that said the court must determine if, "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech is necessary to avoid the danger."[146] Here the Court had applied a standard more stringent than the "reasonable likelihood" test to the question of proscribing pretrial speech. Even though the gag order in *Nebraska Press Association* targeted the press, the Supreme Court's unanimous condemnation of the order and the application of the strict constitutional test caused the American Bar Association to reconsider its Model Code.[147]

Model Rules of Professional Conduct. In 1983, the A.B.A. adopted a revised code known as the Model Rules of Profession Conduct.[148] The Model Rules established a new legal standard for attorney speech that fell between the "reasonable likelihood" test and the "clear and present danger" test.[149] This new standard was the "'substantial likelihood" test.[150] The Model Rules stated:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.[151]

The detailed guidelines for specific items attorneys could and could not discuss remained essentially unchanged from the original Model Code.[152]

The American Bar Association had responded to the call for action to address the fair trial/free press issue of pretrial publicity. Based on the precedent of *Sheppard*, the A.B.A. developed the Model Code using the "reasonable likelihood" standard.

Following the *Nebraska Press Association* decision, the A.B.A. reconsidered the code and drafted the Model Rules using the more stringent "substantial likelihood" standard. Despite the A.B.A.'s diligence in modifying the rules, defense attorneys with an interest in defending their clients in the court of public opinion claimed the standards were far from clear. Many in the legal community wanted the Supreme Court to address the issue and resolve the question of how much attorneys could say publicly prior to trial.[153] The Court would do that in a case known as *Gentile v. State Bar of Nevada*.

Gentile v. State Bar of Nevada. The case that would become *Gentile v. State Bar of Nevada* (1991) began as a sensational Las Vegas burglary case involving drugs, money, and allegations of police corruption.[154] The crime occurred in early 1987 at Western Vault Corporation in Las Vegas. Western Vault was a private high-security storage company specializing in vault storage of highly valuable items.[155] The Las Vegas Police Department had a vault there in which undercover detectives had stored cocaine and large amounts of cash used in undercover investigations. On January 31, 1987, the police discovered that four kilograms of cocaine and nearly $300,000 dollars in cash were missing from the vault.[156] Immediately the investigators' attention focused on Western Vault's owner, Grady Sanders. This was despite the fact that the only two people with unfettered access to the vault were two Las Vegas police officers, and there was no log recording when the vault was accessed.[157]

As the investigation of the theft moved forward, information leaked to the press resulting in multiple published stories about the case.[158] The reports gave information exculpating the police officers and other persons of interest, while at the same time further implicating Sanders in the crime. Several months later, a grand jury indicted

Sanders.[159] Immediately following the indictment on February 5, 1988, Sanders's attorney, Dominic Gentile, held a press conference in an attempt to respond to the pretrial publicity about his client. This press conference was the basis of the case that would become *Gentile v. State Bar of Nevada*.[160]

At the press conference, Gentile told the press Sanders was "being used as a scapegoat" and that there were other people implicated in the investigation who had convictions for drug dealing and money laundering.[161] Though asked by reporters to name these people and to elaborate on their backgrounds, Gentile declined, citing Rule 177 of the Nevada Bar Association's professional standards, which had been adopted from the A.B.A. Model Rule.[162] Gentile did, however, say that much of the background of these other suspects had previously been reported in the press.[163]

Gentile claimed he had studied the Nevada bar's professional standards and believed he was acting within the limits of the standards during the press conference.[164] The Nevada standards were based on the "substantial likelihood" test set forth in the A.B.A. Model Rule. The Nevada standards also included the Model Rule's list of items attorneys could not discuss publicly followed by the list of items attorneys could discuss publicly as identified in the Model Rule.[165] The two lists were joined by a paragraph that read, "Notwithstanding subsection 1 and 2 (a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration ..."[166] Gentile would later say he interpreted the language of that paragraph to mean his statements made at the press conference were allowable under the guidelines.[167]

Six months after the press conference, Grady Sanders went to trial. During *voir dire*, none of the prospective jurors claimed to remember Gentile's press conference,

but some did recall reading press reports about other suspects during the pretrial period.[168] The trial resulted in an acquittal for Sanders. After the trial, the Nevada Bar's disciplinary committee accused Gentile of violating professional ethics in his press conference.[169] Gentile was reprimanded, and the Nevada Supreme Court upheld the reprimand, which prompted Gentile to appeal to the United States Supreme Court. Michael Tigar, who would later represent Terry Nichols in the Oklahoma City bombing case, was Gentile's attorney for the Supreme Court appeal.[170]

The Supreme Court decision in *Gentile v. State Bar of Nevada* was a complicated 5-4 decision. The Court reversed Gentile's reprimand claiming Nevada's Rule 177 was "void for vagueness."[171] The Court was most critical of the paragraph that used the term "notwithstanding" to join the section of prohibited statements with the section of allowable statements. The Court determined that Rule 177, as written, contained ambiguities and contradictions that could lead a well-intentioned attorney astray. Indeed, this is what the majority determined had happened to Gentile. The majority wrote, "The fact that Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary."[172] Based on the language of the rule and the possibility it could allow for discriminatory enforcement, the majority determined Rule 177 was void for vagueness. But the larger issue that the American Bar Association had been wrestling with for two decades remained – What should be the legal standard for imposing limitations on the First Amendment rights of attorneys?

The Court was clearly divided on the proper standard; however, the majority concluded the "substantial likelihood" test was the appropriate standard for balancing

attorneys' First Amendment rights with the state's Sixth Amendment interest of ensuring a fair trial for defendants.[173] Chief Justice Rehnquist wrote for the majority, and he was joined by Justices O'Connor, Scalia, Souter, and White. Justice Rehnquist wrote, "Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct."[174] Justice Rehnquist also wrote that, as key participants, attorneys have access to investigative information during the pretrial stage that could be prejudicial if it were made public. Furthermore, because attorneys hold a privileged position in the legal system, the majority claimed attorney statements might be more likely to sway public opinion. The majority also suggested existing alternative methods of mitigating pretrial publicity might have become less effective due to the ever-broadening reach of mass communication. Justice Rehnquist wrote, "… with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner."[175] Weighing the state's interest in preserving the Sixth Amendment's guarantee of a fair trial against attorneys' First Amendment right to free speech, the majority determined the state's interest took precedent. In conclusion, Justice Rehnquist wrote:

> The restraint on speech is narrowly tailored … The regulation of attorneys' speech is limited – it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys' participating in a pending case; and it merely postpones the attorney's comments until after the trial. While supported by the substantial state

> interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.[176]

Justice Kennedy along with Justices Blackmun, Marshall, and Stevens disagreed with the majority. Justice Kennedy wrote for the group claiming the "substantial likelihood" standard as applied in the Gentile case lacked justification.[177] The Kennedy minority suggested the higher "clear and present danger" standard should be applied instead. Justice Kennedy challenged the majority's claim that attorney speech should be circumscribed because their position might make their statements persuasive. The justice wrote, "The First Amendment does not permit suppression of speech because of its power to command assent."[178] The minority opinion also claimed defense attorneys in particular faced a disadvantage in the court of public opinion. Justice Kennedy wrote:

> The police, the prosecution, other government officials, and the community at large hold innumerable avenues for the dissemination of information adverse to a criminal defendant, many of which are not within the scope of Rule 177 or any other regulation. By contrast, a defendant cannot speak without fear of incriminating himself and prejudicing his defense, and most criminal defendants have insufficient means to retain a public relations team apart from defense counsel for the sole purpose of countering prosecution statements. These factors underscore my conclusion that blanket rules restricting speech of defense attorneys should not be accepted without careful First Amendment scrutiny.[179]

Justice Kennedy called *Gentile* a less than perfect case to test the Constitutional limits of attorney speech, but he surmised, "At the very least … we can say that the Rule which punished petitioner's statements represents a limitation of the First Amendment freedoms greater than is necessary or essential to the protection of the particular governmental interest …"[180]

In *Gentile*, the Court had finally considered the issue of restricting extrajudicial statements, which the American Bar Association and state bar associations had wrestled with for two decades. Still, *Gentile* did not provide the definitive answers many in the legal community – especially defense attorneys – had hoped for.[181] What was clear after *Gentile* was that the Court had suggested pretrial attorney speech could be subordinated to the state's interest in preserving the fairness of the trial process.[182] Also, a majority of justices believed the "substantial likelihood" test was a constitutional method for establishing the limits of proscribing pretrial attorney speech.[183] What was left unclear after *Gentile* was whether or not attorneys should attempt to advocate for clients in the court of public opinion, and if so how they should approach the task.[184]

Broadcasting and Cameras in the Courts

Technological advances during the twentieth century brought new players to the fair trial/free press arena. Radio and television news made the use of microphones and cameras in courtrooms an issue of concern. The history and case law involving broadcasting trials shows that some courts allowed broadcasting when the technology first appeared. As problems with cameras in the courts emerged, many courts began to shy away from the practice, but changes in the technology of broadcasting created a climate in which cameras made their way back into the courtroom. Currently, only the

District of Columbia and Federal Criminal Courts completely prohibit cameras from all of their courts according to an annual report by the Radio Television News Directors Association; however, some states have made the rules for cameras so restrictive as to be almost impossible.[185]

The arguments against cameras in the court include the fear that the presence of cameras will physically disrupt the courtroom. There is also concern that cameras will have a negative psychological impact on court personnel, judges, attorneys, jurors, witnesses, and defendants. Broadcasting trials could be considered an invasion of privacy for some trial participants. The possibility of the media using trial coverage for commercial purposes is another reason to contest cameras. Finally, and most importantly, broadcasting trials presents a risk of prejudicing the jury.[186]

Proponents of cameras in the courtroom say that the practice opens the courtroom to the public and that it levels the playing field for print and broadcast media. Supporters say cameras allow people who would not otherwise be able to go to the courthouse the opportunity to see the courts in action. This is an exercise in informing the citizenry about the operations of its government, and thus it produces a more informed public by putting government operations on display for all to see. There is also the argument that allowing cameras in the courtroom creates parity between broadcast journalists and print journalists by allowing broadcasters to use the full spectrum of technology at their disposal. Broadcasters often use this argument. Finally, some proponents say that broadcasting court proceedings and trials can help bring forth new evidence and new witnesses who have valuable information but were previously unknown to investigators.[187]

The Hauptmann Case. Cameras and microphones did make it into highly publicized cases in the twentieth century and not always with good results. The 1935 murder trial of Richard Bruno Hauptmann, accused of murdering the son of famous aviator Charles Lindbergh, is often cited as one of the most sensational trials of the twentieth century. The case is also often held up as a prime example of sensational media trial coverage run amok. The questionable actions of the press during the Hauptmann trial were a significant factor in later court attempts to restrict the press, including the prohibition of cameras in U.S. Federal Courts.[188]

Charles Lindbergh was one of the most famous people in the United States and around the world in the early 1930s. His rise to fame came with his 1927 non-stop flight across the Atlantic, making him the first person to accomplish this feat. Lindbergh returned a national hero, and he was still very much in the spotlight in the early 1930s.[189]

While most Americans were feeling the tightening grip of the Great Depression in 1932, Charles Lindbergh enjoyed a life of luxury. He and his wife, Ann, along with their one-year-old son, Charles A. Lindbergh, Jr., had recently moved into a newly-constructed fourteen-room mansion on a 390-acre estate near Hopewell, New Jersey. Lindbergh's fame, fortune, and family made him a prime target for a crime that was becoming all too common in the desperate 1930s – kidnapping for ransom.[190]

On the night of March 1, 1932, the kidnapper struck. Using a ladder to get in through the upstairs nursery window, the kidnapper took Charles Jr. from his crib. Neither Charles Sr., nor Ann, nor any of their house staff heard or saw anything. Despite the payment of a ransom, the child was not returned. Several weeks after the

kidnapping, the child's body was found not far from the Lindbergh home. The following investigation would lead to the arrest of a German immigrant named Richard Bruno Hauptmann. Intense press coverage chronicled every twist and turn in the case that resulted in Hauptmann's conviction and execution. On the eve of the trial's beginning in January 1935, the famous journalist H.L. Mencken called it "the biggest story since the Resurrection."[191]

The trial for Richard Bruno Hauptmann began on January 2, 1935, in the small town of Flemington, New Jersey. Reporters and newsreel camerapersons converged on the courthouse by the dozens. Some estimates are that as many as 700 reporters and 130 cameras covered the trial.[192] The trial was front-page news and newsreel fodder across the nation and around the world. Kennedy stated:

> The demand for copy was staggering – the coverage given to the trial exceeded that of any other comparable event in America history, including the Armistice and the Olympic Games. It was estimated that an average of half a million words spewed out of Flemington daily.[193]

The press went to extremes to get the latest information from the courtroom to the public. Photos of the courthouse exterior show a web work of telegraph and phone lines running from poles in the street to the courthouse roof. These lines included a direct cable from Flemington, New Jersey, to London to get the latest news from the trial to Europe as quickly as possible. On the eve of the verdict in the trial, the sheriff instructed deputies to keep people away from windows in the courtroom to prevent reporters from signaling the verdict to colleagues waiting out in the street. To circumvent this plan, an

Associated Press reporter sneaked a shortwave radio into the courtroom so he could relay the decision to a colleague hiding in the courthouse attic.[194]

The Hauptmann trial was one of the first high profile trials covered by newsreel cameras capable of capturing moving images and sound. All of the major newsreel studios of the time had a camera in Fleming, and several of those cameras made it into the courtroom itself. There remains some question about how complicit the court was in allowing newsreel coverage, but the court reacted strongly and angrily when, near the end of the trial, film with sound of testimony began appearing on the screens of movie theaters. Fisher explained how the situation came to a head:

> Judge Trenchard was shocked to learn that newsreel films of the trial were showing in several theaters in New York City and New Jersey. The next morning, the judge discovered that a motion picture camera, housed in a special box to deaden its noise, had been set up in the balcony. The witnesses' voices had been picked up by a directional beam microphone installed on a windowsill thirty-five feet from the stand. The mike was partially hidden by an electric fan that didn't work.
>
> Friday evening, [prosecutor] Wilentz and the representatives of five motion picture companies conferred in the judge's chambers. When the meeting broke up, Wilentz told the press that the motion picture companies had violated a gentlemen's agreement not to film the proceedings. The prosecutor said that he had sent a message to the companies involved – Universal Pictures, Fox Movietone, Pathe News, Paramount Pictures, and Hearst Metrotone News – asking them not to show the films until the trial was over. The camera had been

operated, Wilentz said, without the knowledge of the judge, the prosecution, the defense, or Sheriff John Curtiss. Wilentz then lashed out at the executives of these companies: "These cheap tricksters sit in their offices in New York and Hollywood and think that nothing is superior to the movies and the dollar. They give their word of honor though their representatives – and it was violated."

Fox, Paramount, and Hearst agreed to withhold their films, but Universal and Pathe did not. As Wilentz spoke, newsreels of the trial were playing in moviehouses all over New York City and New Jersey.

Truman Talley, the editor of Fox Movietone News, stood next to Wilentz, and when the prosecutor finished speaking, Talley said that Judge Trenchard, Wilentz, and the defense counsel knew about the camera. "Why, they had a state trooper stationed next to the camera to make sure it wasn't making any noticeable noise," he said.[195]

Reaction to the media spectacle surrounding the Hauptmann trial was highly critical even from some members of the press.[196] The trial raised concerns about fair trial/free press issues in the legal community as well. In a paper delivered at the 1935 American Bar Association convention, Conference of Bar Association Delegates Chairman E. Smyth Gambrell touched on the issue. His comments did not mention the Hauptmann trial specifically, but he generally condemned attorneys involved in high profile cases whom he accused of taking on the role of public relations specialists as opposed to lawyers. Gambrell placed the responsibility of fixing the problem with members of the bar.[197] The next year, the A.B.A. decided to take the initiative and formed the Special Committee for Cooperation between Radio, Press, and the Courts. In

1937, the committee presented what would become Canon 35. Canon 35 recommended banning photography and broadcasting in courtrooms, saying it degraded the proceedings. Every state but Texas and Colorado implemented the ban soon after.[198]

Regardless of whether or not the newsreel cameras were authorized by the court, the impact of the Hauptmann trial films was significant. The newsreels and the general media circus around this case were so widely and roundly criticized that it led many states to ban cameras for nearly 40 years. The federal criminal courts responded in 1944 by establishing Rule 53 of the Federal Criminal Procedure Codes, which expressly forbids any type of broadcasting in U.S. District Court criminal matters. Rule 53 is still in place today.[199]

By the 1960s, some state courts were beginning to experiment with cameras in their courtrooms. The technological limits of this early broadcasting equipment made cameras a threat to courtroom decorum. Cameras of the time were large and required bright lights to make the picture quality sufficient for broadcast. The presence of these cameras and auxiliary equipment were an intrusion on the courtroom, but did they impact the defendant's right to a fair trial? This was a question presented to the Supreme Court in the 1965 case *Estes v. Texas*.

Estes v. Texas. Estes v. Texas (1965) was the appeal of a Texas swindling case that garnered a large amount of publicity including television coverage. Two days of pretrial hearings were broadcast in their entirety by local television stations, and portions of the closing arguments in the trial and the return of the verdict were also broadcast. All of this was done over the objections of the defendant.[200]

The Court noted the disruption the cameras caused in the courtroom:

> [T]he picture presented was not one of that judicial serenity and calm to which petitioner was entitled. Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.[201]

The Court took efforts to explain that barring disruptive broadcast equipment did not put the broadcast media at a disadvantage to their print colleagues. "The television and radio reporter has the same privilege [as the newspaper reporter]. All are entitled to the same right as the general public. The news reporter is not permitted to bring his typewriter or printing press," the Court said.[202] Here the court said that the right to be protected was the right of reporter presence in the courtroom, not the privilege of using equipment specific to the medium employing the reporter.

The Court specified four problems with broadcasting trials. First, the broadcast might inform about particulars of the case so much so that seating an impartial jury would be impossible. Second, broadcasting might adversely affect the testimony of witnesses by making them fearful of testifying and by violating the rule of sequestration for witnesses. Third, broadcasting might be a distraction for judges and attorneys involved in the case, making them feel they must play to the cameras and thereby lose focus on their duties to the court. Fourth, broadcasting might negatively affect the defendant, and it could possibly intrude on the relationship between the defendant and the defense attorney. Beyond these primary concerns, the Court also considered the

possibility that the media might try to use trial coverage for commercial and/or entertainment purposes, thus degrading the solemnity of the judicial process.[203]

Whether or not *Estes v. Texas* should have been interpreted as a complete ban on cameras in the courtroom was a matter of debate in the legal community following the decision.[204] Even so, the effect of *Estes* was that it stalled the migration of cameras into the courtroom in the early days of television broadcast journalism. However, as local television news became a more professional and profitable proposition, technology improvements made the equipment used by broadcast journalists less intrusive.[205] These changes would make one sentence from the *Estes* decision prophetic: "When the advances in these arts [the practice of journalism] permit reporting by printing press or by television without their present hazards to a fair trial we will have another case."[206] That case would be called *Chandler v. Florida*, and it would come before the Supreme Court in 1981.

Chandler v. Florida. In the ten years that passed between the Estes decision and the mid-1970s, television technology made significant advances. Cameras had become smaller, and portable videotape recorders were becoming more common in local television news and commercial video production. By the end of the 1970s, most local network affiliates had adopted videotape for use in their news departments.[207] This improved technology spurred an interest in some states to examine the possibilities of introducing cameras in the courtroom under the strict supervision of the courts. One of these states was Florida.

In 1976, the Florida Supreme Court began surveying the possibility of introducing cameras in the state's criminal and civil courts. In July 1977, the state

conducted a one-year trial in which cameras were present in some courtrooms during trial. After reviewing its own experiment and the results in other states conducting similar experiments, the Florida Supreme Court adopted standing rules that allowed for video coverage of trials in Florida in 1979.[208]

The argument for Florida's admission of cameras was that the judicial process was a significant civic process that should be observed by the public. If more members of the public were able to observe the judicial process via video, it might serve to instill confidence in the justice system, and it might also serve to educate the public about the judicial system.[209]

The rules for cameras in Florida courts placed the defendant's rights to a fair trial as the paramount concern. Judges had discretion to augment or eliminate camera coverage should they feel the defendant's rights were threatened. The rules also addressed some of the problems with camera coverage that were noted in *Estes v. Texas.* For instance, the Florida rules allowed only one stationary camera and one camera operator in the courtroom. News organizations wanting to tape the proceedings would have to accept recordings from a pool feed, and that recording would be done in a room separate from the courtroom. Artificial lighting was prohibited in the courtroom. Audio was to be obtained from the established courtroom audio system, and the rules prohibited the recording of any bench conferences involving the judge and attorneys. These rules were designed to make the cameras as unobtrusive as possible, and they allowed the judges to have a high degree of control over what the cameras presented.[210]

One of the cases to come to trial during Florida's camera experiment was the case of two police officers accused of conspiring to burglarize a Miami restaurant. The

fact that two people sworn to uphold the law were charged with conspiring to break the law, and the fact that the restaurant involved was fairly well known, attracted a considerable amount of press interest in the case. Despite defense objections, the judge allowed portions of the trial to be recorded, and excerpts were aired by broadcast news outlets. The defendants were convicted, and they immediately appealed, claiming the television coverage denied them their right to a fair trial. The appeal reached the Supreme Court as *Chandler v. Florida* in 1980.[211]

The Court ruled on *Chandler v. Florida* in 1981. The decision upheld the convictions. With this decision, the Court clarified that *Estes v. Texas* was not a declaration that broadcast or photographic coverage of trials was unconstitutional.[212] While nothing in the Constitution required broadcast coverage, it was not unconstitutional for states to permit it either, as long as defendants' Sixth Amendment rights were not violated. In his opinion for the Court, Justice Warren Burger went to lengths to explain the High Court was not judging state court policies and procedures. The Court's sole interest was in the extent to which those policies and procedures might violate the Constitution.[213] Specific to the facts of the case, the Court noted that the appellant offered no evidence of how the camera made the trial unfair. Further, the Court stated there was no evidence of "…the 'Roman circus' or 'Yankee Stadium' atmosphere, as in Estes."[214] In conclusion, the Court did not "endorse or … invalidate Florida's experiment," and it made it clear that states could pursue their own experiments in bringing cameras into the courtroom.[215] Thus, after the Chandler decision, similar experiments began in many other states.[216]

The Radio Television News Directors Association tracks state laws regarding cameras in the courtroom. As of 2010, all fifty states have made some provision for cameras; however, according to the RTNDA guide, fifteen states have laws that are so restrictive as to make camera access impractical.[217] The widespread adoption of cameras in state courts has not been without controversy, but it has not led to an overwhelming problem for the courts either. Goldfarb wrote, "…since 1981, when Chandler opened the way for cameras in courts, no verdict has been overturned on the basis of prejudice caused by television."[218]

Around the time the Court decided Chandler, cable broadcasting was taking hold in the United States. When the Cable News Network (CNN) came on the scene, and later Court TV, broadcasting trials would move from a local proposition to a national concern. Goldfarb wrote that CNN has broadcast portions, or in some cases all, of several high profile trials including the 1982 murder trial of Claus von Bulow, libel trials involving entertainer Carol Burnett and the CBS news magazine *60 Minutes*, and the highly publicized and lengthy child abuse case involving the McMartin nursery school in California.[219]

Many cable channels and some network affiliates carried portions of the 1995 O.J. Simpson trial, and some carried the trial in its entirety. Despite the criticism the ceaseless O.J. trial coverage generated, one episode during the trial showed how cameras could aid courts in the search for truth. During cross-examination of Los Angeles Police Department Detective Mark Fuhrman, the detective denied he had ever used racist language in reference to African-Americans. This testimony was broadcast nationwide, and it caught the attention of a woman in North Carolina. Years earlier, this

woman had interviewed Fuhrman, and she still had possession of the tapes from those interviews. She recalled that Fuhrman had indeed used racist language during the interviews. She contacted the Simpson defense, and defense attorneys were able to confront Fuhrman with his earlier statements. It could be argued that were it not for live trial coverage, such information might not have surfaced, and, even if it had, it might not have been made available to the defense as quickly.[220]

Yet support for broadcasting trials suffered a major setback with the trial of O.J. Simpson.[221] Following the media spectacle that was the Simpson trial, many scholars and lawyers began to ask if the critics of cameras in the courts were not correct.[222] However, according the RTNDA, the number of states that have adopted rules for cameras has increased since the Simpson trial, so there does not appear to be a large-scale retreat from the practice.[223]

By the time of the Oklahoma City bombing, cameras had found their way into courtrooms in many state courts; however, federal criminal courts remained off limits to cameras. Still, the experiments in other federal courts suggested some members of the federal judiciary were willing to at least consider a possible role for video coverage of federal proceedings. It was into this environment that the case against Timothy McVeigh and Terry Nichols arrived in 1995.

The trials of Oklahoma City bombers Timothy McVeigh and Terry Nichols were important events in legal history as it pertained to cameras in courtrooms. Several media outlets including Court TV sought permission to broadcast the trials, and even some legal experts called the trials a textbook case for gavel-to-gavel coverage.[224] However, broadcasting to a nationwide audience was not to be. The trials were, in fact,

broadcast though. This makes the McVeigh and Nichols trials the only federal criminal trials to deviate from Rule 53 since the rule's inception in 1944.

The McVeigh and Nichols trials were broadcast via closed-circuit to an audience of bombing victims and court personnel in Oklahoma City due to a provision of the Antiterrorism and Effective Death Penalty Act of 1996.[225] The law was passed after the case had been moved from Oklahoma City to Denver. Lawmakers recognized that the change of venue would mean many of the 2,000 people who had registered with the court as victims would not be able to attend the trial. To compensate these victims, the law made a provision that federal criminal trials moved more than 350 miles from the original jurisdiction would have to be available to victims via closed-circuit television. This law included stipulations that only court recognized victims and court personnel would be allowed to view the closed-circuit broadcast.[226] This is not the same as Court TV coverage, but it is a significant event in that Congress compelled the federal courts to deviate from Rule 53, even if only in a limited case.

Finding a balance in the fair trial/free press debate has been a long and complex journey for the American legal system. It is also a journey that is still not complete. New technologies and new cases will present more challenges that the Court and the press will have to take up in the future. The Oklahoma City bombing case is one such case that presented a most unusual circumstance for the federal courts. The nature of the crime and the technology available at the time offered an opportunity for the courts and the legislative branch to break new ground in the area of fair trial/free press conflicts. Federal law was changed to allow for a broadcast of the trials, though not an open broadcast to all potential viewers. As such, the McVeigh and Nichols trials were a

deviation from the proscriptions of Rule 53. To the degree that these closed-circuit broadcasts were successful in meeting the intent of the law that provided for them, they may serve as a model for future change of venue cases in federal criminal courts.

Research Problem and Questions

The literature on fair trial/free press conflicts in the American legal system shows that the courts have had to deal with the problems presented by the often-conflicting rights established by First and Sixth Amendments almost since the founding of the nation. The primary fair trial/free press conflict pits the right of the press to report on criminal matters and the operations of the courts against the defendant's right to a fair trial before an impartial jury, presumably unaffected by pretrial publicity.

Concerns over juror bias and the role the press may have played in forming bias were a common thread that ran through cases from the Burr trial of 1807 to the landmark cases of *Sheppard v. Maxwell* in 1966 and *Nebraska Press Association v. Stuart* in 1976. While it took nearly 160 years from the Burr trial to the *Sheppard* decision to establish methods for dealing with the dangers of pretrial publicity, the legal community quickly adopted the suggestions put forth in the *Sheppard* decision. The American Bar Association and some state bar associations, such as Nebraska's, used the *Sheppard* ruling as the basis of their press/bar guidelines. Successful prosecution of high profile cases like the Manson trial suggests the *Sheppard* provisions have served their purpose – protecting the defendant's right to a fair trial including an impartial jury. *Nebraska Press Association v. Stuart* took the guidelines too far, however, and the Court determined that even well-intentioned efforts to follow the guidelines and protect

the defendant's Sixth Amendment rights could not go so far as to be an *a priori* restraint infringing on the First Amendment rights of the press.

In the 1970s and 1980s, the Supreme Court began to consider whether trial courts should have the right to restrict press access to court proceedings. The *Richmond Newspapers* decision, while not unanimous, established a presumption of openness for trial proceedings. *Gannett v. DePasquale*, *Press Enterprise I*, and *Press Enterprise II* brought the issue of openness in suppression hearings, pretrial hearings, and jury selection before the Court. From these cases, the Court developed the tests to be used before excluding the press from these proceedings.

Beginning in the 1960s, the Court and the American Bar Association began a two-decade process of determining the limits of extra judicial statements. *Sheppard v. Maxwell* held that trial judges could limit the speech of persons under their control in the interest of preserving a defendant's right to a fair trial. The American Bar Association would use *Sheppard* and later *Nebraska Press Association* to establish a sufficient legal standard for ethics rules regarding extrajudicial statements. The A.B.A. settled on the "substantial likelihood" standard in the Model Rules of Professional Conduct adopted in 1983, but many defense attorneys believed the rules were too restrictive and possibly unconstitutional. The Court finally took up the issue in *Gentile v State Bar of Nevada*. A slim majority of the Court determined the "substantial likelihood" standard was constitutional, but the decision did not provide the definitive answer many attorneys had wanted.

With the emergence of broadcasting in the first half of the twentieth century, the courts began to face the issue of whether to allow broadcasting of court proceedings.

Early on, the courts were permissive, but episodes like the Hauptmann trial, in which the presence of cameras appeared to play a role in sensational coverage, led to a near nationwide ban on broadcasting from state courts and a complete ban on broadcasting from federal courts. Cameras would not find their way back into state courtrooms on a large scale until after the 1981 *Chandler v. Florida* decision. Following the *Chandler* ruling, broadcasting of state criminal trials began to increase nationwide, yet the federal court ban remained in place.

The literature on the Oklahoma City bombing shows that much effort has gone into the study of the crime itself, the government response to the crime, and the psychological and sociological factors that likely influenced the perpetrators. However, little has been written on the trials of the conspirators. This is despite the fact that the trials for Timothy McVeigh and Terry Nichols were highly publicized prosecutions of an unprecedented crime that involved the first and, to date, only implementation of the closed-circuit viewing provision of the Antiterrorism and Effective Death Penalty Act of 1996.

As the literature review suggests, by the time of the Oklahoma City bombing trials, the courts had developed procedures and protocols for managing fair trial/free press issues arising from conflict between the rights of the press, contained in the First Amendment, and the rights of criminal defendants, contained in the Sixth Amendment. The Oklahoma City bombing case though was in many respects a case unlike any other prior to 1995. At the time, it was the most deadly terrorist attack ever committed in the United States. As such, the case attracted intense press coverage, making fair trial/free press issues of paramount concern to the trial court. This study examines the fair

trial/free press issues raised in the Oklahoma City bombing case. Its primary purpose is to explain which fair trial/free press issues came before the courts and why. Included in the primary purpose is an attempt to explain how the courts resolved the fair trial/fair press issues and the impact the courts' decisions had on the management of the trials.

Research Questions

The research questions posed here advance knowledge about the prosecution of the Oklahoma City bombing conspirators. They also advance knowledge regarding fair trial/free press issues in the American judicial system by focusing attention on the Oklahoma City bombing trials, which were both important and unique in the annals of American justice.

Writings about the Oklahoma City bombing case suggest that researchers have paid relatively little attention to the trials of Timothy McVeigh and Terry Nichols and less attention to the fair trial/free press issues raised in the trials. One of the few examinations of these issues is a single article written by Timothy McVeigh's lead attorney Stephen Jones and attorney Holly Hillerman shortly after the conclusion of the trials. While this writing is of value as the recollections of a key trial participant, the first-hand participant's perspective carries with it the partiality of a participant. In this respect, the literature would be strengthened by an objective examination of the specific fair trial/free press issues brought before the court in the Oklahoma City bombing case. Furthermore, identifying the specific fair trial/free press issues raised in the case is essential to reach a deeper understanding of how those issues impacted the trials. Thus, the first research question focuses on identifying these issues.

RQ 1: What were the fair trial/free press issues brought before the courts in the Oklahoma City bombing trials?

Prior research shows that by the time of the Oklahoma City bombing trials, the courts had established precedent to guide trial courts in resolving fair trial/free press issues that are inherent aspects of high profile criminal trials. Supreme Court decisions, bar association guidelines, and local court rules provided protocols for dealing with the tensions between the First Amendment rights of the press and the Sixth Amendment rights of the defendants. The literature suggests that the courts handling the Oklahoma City bombing case utilized existing precedent and protocol when dealing with fair trial/free press issues. Understanding how the courts resolved these issues will advance knowledge about the Oklahoma City bombing case and fair trial/free press issues on a broader scale.

RQ 2: How did the courts employ precedent and protocol to resolve the fair trial/free press issues present in the Oklahoma City bombing trials?

Writings on the Oklahoma City bombing case suggest that the courts' attempts to alleviate fair trial/free press concerns impacted the management of the case. The literature suggests that concerns about pretrial publicity were a factor in the courts' establishment of procedures for filing documents under seal. Similar concerns led to restrictive orders on attorney comments and appeals from Timothy McVeigh's attorneys to modify those orders. Press coverage was also a factor in the decision to grant a change of venue, moving the case from the Western District of Oklahoma to the District of Colorado. The change of venue was the impetus for congressional action, which led to closed-circuit broadcasts of the trials. These facts suggest that the steps the court took

to resolve fair trial/free press issues in the Oklahoma City bombing case had an impact on several aspects of managing the case, including when and where the trials took place, how attorneys fulfilled their obligations, and special accommodations for bombing victims to view the trials.

RQ 3: How did the courts' resolution of the fair trial/free press issues affect the courts' management of the Oklahoma City bombing trials?

The federal trials of Timothy McVeigh and Terry Nichols are, to date, the only federal criminal trials conducted in the presence of live television cameras. These live broadcasts were restricted to a closed-circuit feed, and the court limited the viewing audience to court-approved viewers, primarily bombing victims, and court personnel. The closed-circuit viewing was a provision of the Antiterrorism and Effective Death Penalty Act of 1996. Writings on the bombing case suggest that appeals from bombing victims to Congress following the change of venue were a significant factor in getting the closed-circuit provisions added to the legislation. Understanding how the closed-circuit provisions became a part of the Antiterrorism and Effective Death Penalty Act of 1996 is necessary to understand how the closed-circuit broadcasts became a feature of the Oklahoma City bombing trials. Since these broadcasts were the first and only of their kind, understanding how they came to take place will advance knowledge about the fair trial/free press issue of broadcasting trials.

RQ 4: How did the closed-circuit viewing provisions become a part of the Antiterrorism and Effective Death Penalty Act of 1996?

Writings on the bombing suggest that the trial court faced an unprecedented decision after President Bill Clinton signed the Antiterrorism and Effective Death

Penalty Act of 1996. The court could stand on the Rule 53 that banned broadcasting of federal trials or it could accommodate the closed-circuit provisions included in the law. Ultimately the court allowed the closed-circuit broadcasts. In doing so, the court established rules for viewing, employed technology needed for the broadcasts that was unfamiliar to the federal courts, and responded to requests from the press for access to the broadcasts. No other federal court before or since has dealt with a closed-circuit broadcasts. Understanding how the court decided to accommodate the closed-circuit broadcasts and how it ultimately managed the broadcasts will advance knowledge about the Oklahoma City bombing trials and the fair trial/free press issue of broadcasting trials in general.

RQ 5: How did the court implement and manage the closed-circuit viewing provision of the Antiterrorism and Effective Death Penalty Act of 1996?

The research questions provide a logical progression of inquiry. The first step in the progression identifies the specific fair trial/free press issues that came before the courts and why those issues were raised. With the issues identified, it is possible to explain how the courts used existing precedent and protocol to resolve those issues. Understanding how and why the courts resolved the issues in the ways they did makes it possible to examine how the courts' decisions affected management of the trials. The trial court in the Oklahoma City bombing case managed an unprecedented closed-circuit television feed. This made the trials of Timothy McVeigh and Terry Nichols unprecedented trials in that respect. The research questions on the closed-circuit broadcasts will show how the court came to allow the closed-circuit broadcast and how the court implemented and managed the closed-circuit broadcasts. Answering these

research questions will strengthen the literature on the Oklahoma City bombing by providing a deeper understanding of how fair trial/free press issues played a role in shaping the trials of Timothy McVeigh and Terry Nichols. Until now, scholars have paid little attention to the fair trial/free press issues in this case, yet the literature suggests that fair trial/free press issues were a significant concern for the courts managing the case. Answering these questions will also advance knowledge in the broader fair trial/free press literature by examining how the courts employed precedent and protocol to manage fair trial/free press issues in one of the most highly publicized criminal trials in American history.

This study will also make a valuable contribution to the developing body of historical and conceptual knowledge about the continuing challenges fair trial/free press issues raise for legal scholars, mass communication scholars, practitioners, and public policy makers. This study will reveal the precedents the courts relied on to resolve the fair trial/free press issues in the Oklahoma City bombing trials. It will also show how past events shaped the precedent employed in the Oklahoma City bombing case and how those precedents may affect future highly publicized trials involving terrorism.

CHAPTER II

Method

Introduction

History, the study of the past, is one of the oldest and most venerated ways of knowing that people have used to interpret and understand the world around them. As a discipline, history in the West has its methodological beginnings in ancient Greece. Herodotus (c. 485 – c. 425 BC) is credited with being "the father of history."[1] Herodotus's contribution came from the use of evidence to record verifiable events of the past and make distinctions between evidence-based accounts and myths.[2] Thucydides (c. 460 – c. 399 BC) is generally recognized as the first "genuinely scientific historian."[3] Thucydides's goal was to create a record for the purpose of instruction. Thucydides sought accuracy through evidence, and he was the first to introduce the concept of critical analysis in cases where witness accounts differed. He recognized that human memory was not infallible and that sympathies and allegiances could color and shape recollections of past events.[4]

The Renaissance and the Reformation did much to advance history and the methods of historical research. The Renaissance brought renewed interest in the works of the Greeks and Romans, thus challenging religious authorities' exclusive claims on knowledge and learning. The Reformation served to further develop critical textual analysis as Catholic and Protestant scholars reexamined medieval texts in an effort to prove or disprove the lineage and legitimacy of the Roman Church.[5]

Garraghan called the late eighteenth century and all of the nineteenth century an era of significant methodological advancement.[6] The professional historian emerged

during this time, and many of these historians were inspired by intellectual movements, such as positivism, to bring scientific methods and considerations of causality to history. Historians such as Barthold Niebuhr, John Lingard, and Leopold von Ranke advocated primacy of original documents, rigorous criticism of sources, and the use of archives that were becoming more common at the time.[7] Garraghan called Ranke "the 'father of modern scientific history'" for having established the first seminars in historical methods and pioneering archival research.[8] Howell and Prevenier wrote, "In Ranke's view, history was a learned craft, the science of 'telling things as they actually occurred,' of insisting that 'if it is not in the documents, it did not exist'"[9] In its most basic form, Ranke's view of scientific history pointed to the supremacy of the document. The document contained the facts, and if one were to assemble enough facts using rigorous methods, the truth about the past would emerge. Novick claimed this Rankean approach led to a myth of objectivity among historians of the nineteenth century.[10] Novick wrote:

> This, then, was the model of scientific method which, in principle, the historians embraced. Science must be rigidly factual and empirical, shunning hypothesis; the scientific venture was scrupulously neutral on larger questions of end and meaning; and, if systematically pursued, it might ultimately produce a comprehensive, "definitive" history.[11]

In the late nineteenth century and early twentieth century, a new generation of historians known as "Progressive" historians began to challenge the Rankean view of scientific history.[12] Some of the leading early Progressive historians included Charles A. Beard, Carl Becker, James Harvey Robinson, and Frederick Jackson Turner.[13]

Progressives wanted to advance the purpose of history beyond mere explanation of the past and give their histories a purpose. That purpose was to give history relevance in the present often with the goal of advancing social or political reform.[14] The Progressive historians recognized that sources were not objective accounts of the past from which a complete objective history would merely emerge. Documents were the creation of historical actors who had motives and goals of their own. Understanding and interpreting these motives and goals was part of the job of the historian, according to the Progressives. Also, Progressive historians realized that historians themselves approached their subjects of study with motives and goals that could influence what they looked for and ultimately what they found in their sources.[15] Becker and Beard eventually set notions of objectivity aside and argued for historical relativism. Harrison, Jones, and Lambert explained the historical relativism argument:

> They [Progressives] argued that the past could not be accessed directly, but only through the documentary traces that had been left behind. Historical "facts," therefore, rather than being "found," were constructed by the historian herself. History does not have an inner structure, and immanent pattern, other than that imposed by the historian. Historical interpretation, therefore, must inevitably involve the application of "transcendent" concepts and hypotheses that come from the mind of the historian rather than from the evidence. It was impossible to exclude human prejudices and presuppositions from the process of interpretation, since the subject-matter of history was inevitably charged with values.[16]

The issue of objectivity remains a matter of debate among historians.[17] The Progressive historians and others who followed them have raised compelling arguments about subjectivity and the role of interpretation in producing history. Tosh has provided three strategies for historians "to ensure … they are as true as they can be to reality of the past."[18] First, historians should examine their own values, beliefs, and assumptions that might introduce bias into the subject of their study. Second, historians should clearly state their hypotheses or research questions and actively challenge the answers they research regarding those hypotheses and research questions. Finally, historians should devote themselves continually to understanding the context of the past events they study.[19] While these strategies will not lead to a purely objective study, they can help the researcher recognize potential bias, and they offer a degree of transparency to the research process.

This study borrows from both the Rankean and the Progressive schools of thought. It borrows from the Rankean scientific school by application of the empirical approach to study design and the vetting of sources, but not the claims of objectivity advanced by scientific history scholars of the past. The study recognizes the practical purpose advanced by the Progressive school by seeking to create a study that is meaningful and informative to a present audience. The study further recognizes the Progressive criticism of scientific history's claims to truth and objectivity, and the study utilizes the prescriptive measure of explicit research questions explained by Tosh to bring transparency to the study.

Empirical History

The methods of historical research allow historians to make the claim that their discipline is empirical. Nord wrote, "History is an empirical study that uses various levels of generalization to describe, interpret, or explain collections of data."[20] Empiricism, a way of knowing based on observation, is most often associated with the sciences.[21] The scientific method provides rigorous and controlled processes of collecting data and analyzing that data to answer specific research questions in an attempt to advance knowledge.[22] Notwithstanding their claims of objectivity and the ability of the truth to emerge from properly aligned sources, the Rankean scientific historians of the nineteenth century sought to bring a similar measure of recognized, rigorous method to the study of history.[23] To the extent that they succeeded, modern historians can make a claim to empiricism; however, a direct comparison to empirical science is not always possible.

The methods of the empirical historian share similarities with the methods of the empirical social scientist. The historian and the social scientist both begin their research by examining the literature in their area of interest. This review of literature should direct the researcher to a topic suitable for study. The review of literature also leads to the development of research questions. With a research topic and research questions in place, the researcher may begin collecting data to answer the research questions. In the case of the historical researcher, the data are historical sources. Once the data are collected, the researcher may begin analyzing the data and interpreting the data in an effort to answer the research questions. The tools for data collection and analysis may differ for the historical researcher and the social science researcher, but in both cases,

the application of recognized and proven methods provides a systematic and rigorous means of producing results that will advance knowledge with a measure of reliability to the results.[24]

Nord argues that the influence of social science on historical research has led to two types of historians – social science historians and humanist historians. Nord wrote that the social science historian "is interested primarily in general processes and ultimately hopes to construct generalizations and theories to explain classes of events without regard to space and time."[25] The social science historian's goal then is more closely related to the scientist's goal. On the other hand, the humanist historian "is interested primarily in unique events and sequences, seeks to understand an event by understanding its context in a particular place and time."[26] The humanist historian has a goal of advancing knowledge by providing a detailed explanation of specific events relative to a specific place and time. Generalization is not the goal of the humanist historian. The humanist approach to history is the more traditional approach, but both humanist and social science historians have contributed to the advancement of knowledge.[27] While the goals of the scientist, the social science historian, and the humanist historian may differ, each type of researcher may utilize empirical methods in the research process, thus historical research can claim to be empirical research.

Application of Method

The historical method has developed as a means of producing knowledge about the past. It is empirical when the researcher uses systematic and rigorous methods of data collection and data analysis. To achieve the purpose of this study, the researcher

applied recognized historical research methods to examine fair trial/free press issues in the Oklahoma City bombing case.

Startt and Sloan placed two major tasks before the historical researcher. "One is to describe the essential nature of the past. The other is to explain why that essential nature was as it was."[28] In searching for the essential nature of the past, the historian operates with three primary assumptions in mind. First, the historian assumes that people did live in the past and, during their lives, these people formed thoughts based on their perceived reality and took actions based on their thoughts. Second, the historian assumes these people of the past left artifacts behind that preserved their thoughts and actions. Third, the historian assumes that the artifacts left behind provide clues about the people of the past and the times in which they lived.[29] The artifacts left for the historian to examine then become the sources, or raw data, for historical studies.

Topic Definition

The historian's first use of sources is for the purpose of topic definition. The research topic should be well-defined with the goal of creating significant research that will advance knowledge in the subject area.[30] The well-defined topic will help the researcher pose an informed research question and design a focused research plan to answer that question. The methods of immersion and guided entry help the researcher define the topic and begin to get a clear focus on the research question.[31]

Immersion. Immersion is a method to get the researcher deeply involved in the literature of a particular area of historical interest. Essentially, the researcher will search for and read as much as possible related to the issue of interest. Smith suggested a

strategy to make the immersion process productive while not overwhelming for the researcher. Smith wrote:

> As the immersion process begins, the historian might ask the journalist's traditional *who, what, when, where, why, how* questions to guide the data search. In this way the historian generally limits the area of immersion (to prevent drowning by arbitrary, but helpful, geographical, biographical, chronological, functional, or occupational boundaries.[32]

Immersion reading should begin with the most relevant historical works that focus on the topic of interest. While reading these major historical works, the researcher should take note of other sources that indirectly address the topic. The sources may include works in other fields such as economics, political science, or psychology. The importance of this broad immersion reading is that it allows the researcher to gain an understanding of the issue that is both broad and deep.[33]

Writings about the Oklahoma City bombing referenced in the review of literature presented in Chapter 1 of this dissertation were used in the immersion stage of this study. The works consulted in this immersion process included historical accounts as well as works from the fields of sociology and law. Journalistic accounts and personal accounts from bombing victims were also consulted.

Works directly related to the Oklahoma City bombing read as part of the immersion process included *American Terrorist: Timothy McVeigh and the Oklahoma City Bombing,* written by journalists Lou Michel and Dan Herbeck. *American Terrorist* is an account of the bombing based on interviews Michel and Herbeck conducted with Timothy McVeigh following his conviction. Another journalistic account consulted was

9:02 a.m. April 19, 1995: The Official Record of the Oklahoma City Bombing, published by *Oklahoma Today Magazine*. This book, published in 2005, is a chronological account of the bombing, the investigation, the trials, and the development of the Oklahoma City National Memorial based on news reports and government documents.

Two books by criminologist Mark S. Hamm, *Apocalypse in Oklahoma: Waco and Ruby Ridge Revenged* and *In Bad Company: America's Terrorist Underground* were also consulted. Hamm's work provides historical background on the bombing itself as well as sociological examination of militia and anti-government ideology in America. Another sociological account included in immersion reading was *Patriots, Politics and the Oklahoma City Bombing* by Stuart A. Wright. Wright's book examines the rise of the Patriot Movement and the influence of Patriot Movement rhetoric on the bombing conspirators. Wright was a consultant for the McVeigh defense team, and he conducted interviews with McVeigh for his research.

Others Unknown: The Oklahoma City Bombing Case and Conspiracy is a book by McVeigh's lead trial attorney, Stephen Jones, and author Peter Israel. The book advances Jones's claims that McVeigh and Nichols acted as part of a broader conspiracy, but it also provides a first-hand account of the McVeigh trial including some of the fair trial/free press issues of interest in the present study. Stephen Jones and Holly Hillerman focused specifically on fair trial/free press issues in the Oklahoma City bombing trials in their 1998 article *McVeigh, McJustice, McMedia*. This article is the only work to focus solely on fair trial/free press issues related to the case. Another legal work included in immersion reading was Michael E. Tigar's *Opening Statement and*

Closing Argument: United States vs. Terry Nichols published by the Professional Education Group as part of the series Classics of the Courtroom. As the title implies, this work is a transcript of the opening and closing statements made by Nichols's lead counsel.

Forever Changed: Remembering Oklahoma City, April 19, 1995 is a collection of essays written by bombing survivors and family members of bombing victims. The editor of the book, Marsha Kight, lost her daughter in the bombing. Kight's book reveals the loss and emotional toll the bombing had on the victims and their families. Collectively, these works read during the immersion process provided a broad range of perspective on the Oklahoma City bombing case. This reading aided in preparing for the next process, which is guided entry.

Guided Entry. Guided entry is a method for using the large amount of material generated through immersion to guide the researcher to a focused topic and ultimately the research questions.[34] Guided entry is a process of delimiting data so that researchers can begin to focus on exactly what it is they want to know, and they can begin to develop a research question based on that interest.[35] Startt and Sloan suggested returning to the questions of who, what, where, and when to help narrow the focus of guided entry.[36] The guided entry method should lead the researcher to informed research questions for which there is an ample body of source material to answer.[37]

In this study, the guided entry process led to a focus on fair trial/free press issues in the Oklahoma City bombing case. The immersion process showed a rich body of literature on the Oklahoma City bombing, but it also identified a weakness in the literature; little has been written on the trials of the bombing conspirators, and little has

been written on the conflicts between the press and the courts in the case. At the same time, the literature suggested these fair trial/free press issues did occupy the attention of the courts on multiple occasions, and the actions the courts took regarding these issues did play a role in shaping the trials of the defendants.

Developing the Research Question

Immersion and guided entry help lead the researcher to a relevant research question capable of being answered by the source material acquired. The research question should focus the researcher's efforts, but it should not be inflexible. Smith wrote "… the historical research question should be open-ended in that it dictates the kinds of facts to be observed in responding to the question without dictating the solution or the analysis to be offered in the response."[38] The initial research question may be refined as the research process moves forward. Other research questions may emerge during the process. In either case, the research questions should serve as a means to focus the research, but they should not prevent the researcher's efforts to make inferences from the sources and to draw conclusions from those inferences in the analysis.[39]

In this study, immersion and guided entry led to a focus on fair trial/free press issues in the Oklahoma City bombing case. The research questions developed to explore those issues were designed to determine which fair trial/free press issues came before the courts, how the courts resolved those issues, and how resolution of those issues affected management of the case. Two research questions also focused on the unprecedented closed-circuit broadcasts of the trials.

Sources

To answer the historical research question, the researcher looks to sources, which are the raw data for the historian. Startt and Sloan wrote that there are four basic methods of historical research in which sources are employed.[40] Those elements are "compiling a complete record, evaluating the sources that compose that record, understanding the explicit and implicit meaning of those sources, and explicating the essence of those sources in the history one produces."[41] The strategies and tools historians use in meeting the requirements of the four elements are at the heart of the historical method.

Types of Sources

Historians generally categorize sources in two classes: primary sources and secondary sources. Startt and Sloan called primary sources "the raw materials of history."[42] Primary documents are records contemporaneous with the events under study. Examples of primary documents include court records generated at the time of the case being studied, or diaries of a person involved in the events being studied, interviews with persons involved in the events being studied, or newspaper articles published at the time the event happened. These could all be classified as primary sources. Secondary sources, "rest on primary sources and they are not contemporaneous with the subject under study."[43] Secondary sources can do much to inform the historical researchers, but primary sources, as the name implies, are of the most importance to historians creating original historical research.

Primary source materials for this study consisted of court records, contemporaneous press accounts, and oral history interviews with trial participants. The

archival source of court records was the Oklahoma City National Memorial and Museum in Oklahoma City, Oklahoma. The museum archive contains more than 600,000 artifacts related to the Oklahoma City bombing.[44] One of the six major categories of museum holdings focuses on the investigation of the bombing and the trials of the bombing conspirators. The investigation and trial holdings include a twenty-box collection of court documents that are presented as a complete copy of case documents obtained from the federal courts for the Western District of Oklahoma and the District of Colorado. This collection contains briefs, motions, minutes, orders and opinions, and other legal documents from the beginning of the case in 1995 to the end of federal appeals in 2001. This collection includes documents related to fair trial/free press issues raised during prosecution of the McVeigh and Nichols cases.

In April, May, and December 2010, the researcher visited the Oklahoma City National Memorial and Museum to conduct research in the archive. The researcher examined the entire collection of trial documents and identified key documents related to fair trial/free press issues in the bombing case. These documents address issues central to the focus of this study including: (1) the change of venue, (2) press access to court documents and court proceedings, (3) press access to audio recordings of court proceedings, (4) restrictive orders governing extra judicial statements made by attorneys, investigators and court personnel, (5) closed-circuit television coverage of the trials, and (6) court actions taken subsequent to the publication of confession stories on the eve of the McVeigh trial. These key documents number approximately fifty and total more than 400 pages.

Contemporaneous press reports regarding fair trial/free press issues in the bombing cases were also examined as primary sources. Historians have long used press accounts of events under study to aid in factual verification and to provide context for said events.[45] For this study, press accounts were used to supplement the court records in establishing a chronological record of motions and hearings related to fair trial/free press issues in the case. The press accounts also contained quotes from trial participants reacting to motions filed and decisions made in the case. These contemporaneous reactions and comments assisted in putting events into context and assessing the impact of major developments in the cases on trial participants.

The researcher identified six newspapers that provided extensive coverage of the bombing trials. Those newspapers were *The Oklahoman*, *The Dallas Morning News*, *The Denver Post*, *The Rocky Mountain News*, the *New York Times*, and *The Tulsa World*. As the hometown paper in the city in which the bombing occurred, *The Oklahoman* dedicated perhaps the most staff and space to covering the bombing. This is apparent from the number of articles and the number of reporters writing those articles from the time of the bombing through the end of the Nichols trial. As the daily newspaper serving Oklahoma's second largest city, *The Tulsa World* also provided regular coverage of the bombing investigation and subsequent trials. *The Dallas Morning News* gave extensive coverage to the bombing case. As a media litigant, the *Dallas Morning News* filed two motions asking the court to unseal documents in the case.[46] *The Dallas Morning News* also published one of the confession stories on the eve of the McVeigh trial.[47] The Denver newspapers, *The Denver Post* and *The Rocky Mountain News*, gave extensive coverage to the case once the District of Colorado

assumed jurisdiction. The *New York Times* has a national audience and a reputation with media historians as a source for events of national importance. In total, the researcher collected 534 individual newspapers articles focusing on the prosecution of the Oklahoma City bombing case from these six newspapers that were originally published between April 1995 and August 1998. Press reports for this study were collected using two full-text newspaper archive databases available through the University of Oklahoma Libraries. The archival databases were the Oklahoma Archives, a full-text database for *The Oklahoman* newspaper, and NewsBank, a full-text database that archives newspapers published in the United States and also internationally.

In April 2011, the researcher was able to conduct oral history interviews with Stephen Jones and Michael Tigar. Stephen Jones served as lead counsel for defendant Timothy McVeigh in his federal trial. Michael Tigar served as lead counsel for defendant Terry Nichols in his federal trial. As lead defense counsels, Jones and Tigar directed the drafting of defense motions related to fair trial/free press issues in the Oklahoma City bombing trials. Jones and Tigar also argued many of the fair trial/free press motions before the court. Their recollection of issues and events during the progression of the case provided first-hand accounts of and unique insight into fair trial/free press issues that emerged in the bombing case. The researcher sought oral history interviews with other trial participants, but was unsuccessful. Interview subjects who were sent letters of inquiry requesting oral history interviews but who did not respond included: (1) Joseph Hartzler, lead prosecutor in the McVeigh trial, (2) Thomas Kelley, attorney for the media consortium, (3) Judge Richard Matsch, trial judge for both the McVeigh and Nichols cases, and (4) Patrick Ryan, Western District United

States Attorney at the time of the bombing trials and prosecutor in both the McVeigh and Nichols trials. All oral history interviews conducted for this study were approved by the University of Oklahoma Institutional Review Board, and the interviews were conducted in compliance with I.R.B. protocol.

Source Criticism

Once the historian has classified the sources, it is time to move on to the critical evaluation of those sources. Howell and Prevenier wrote "… the historian's basic task is to choose *reliable* sources, to read them *reliably*, and to put them together in ways that provide *reliable* narratives about the past."[48] Historians use the method known as source criticism to evaluate the reliability of the sources they acquire. The source criticism method is a two-step process that subjects sources to external criticism and internal criticism.

External criticism focuses on the authenticity of the source. In the case of an original document, a primary source, the researcher must determine if the document was indeed produced at the time it was supposed to have been written.[49] The researcher must also determine if the document was indeed authored by the person or entity claiming authorship. Even if other historians have treated the document as authentic, it behooves the researcher to conduct external criticism of the document. The steps taken in external criticism are coalition, identification, and textual verification. Coalition is the comparison of multiple texts for the purpose of establishing authenticity of the text in question. Identification is the attempt to identify authorship in cases where the author is not identified. Textual verification is a process in which the researcher examines a text for punctuation, word usage, and thought patterns. These patterns can be compared to

known examples of the author's writing to help determine if it is plausible that the author wrote the text in question.[50]

Internal criticism focuses on the accuracy of the source. If the source is found to be authentic, the researcher must determine if the source accurately represents the past events described in the source. The researcher should ask several questions about the source such as whether or not the author would have been in a position to observe and then describe the events detailed in the source material. Another consideration for establishing internal criticism focuses on the motivation of the author who created the source. The question here focuses on whether the author was seeking to objectively describe events or to promote a biased account of those events. The researcher should also seek multiple sources that provide accounts of the events in question.[51] Comparing multiple sources pertaining to a common event is one way the researcher can conduct internal criticism. Establishing what these multiple sources agree on and disagree on can help the researcher draw conclusions about the accuracy of the source in question. Historians must recognize that no single source is omniscient. Each source provides a perspective of an event, but no source can provide all perspectives of an event.[52]

In conducting source criticism, the researcher examined all court documents for the court clerk's filing stamp and author signatures. The researcher also verified that each document corresponded with the entries on the docket sheets. This process of external criticism provided reasonable certainty in the authenticity of the primary source legal documents. Primary source newspaper articles were retrieved from databases provided for the purpose of scholarly research and created with the support of newspaper publishers. To the extent these databases are supported by research

institutions with the permission and cooperation of publishers, the researcher was satisfied in the authenticity of these articles. The oral history interviews were conducted with key trial participants, whom the researcher spoke to personally, thus satisfying the claim to authenticity of these interviews.

In conducting internal criticism, the researcher employed a triangulation approach using the methods of multiple source comparison described previously. This approach allowed the researcher to compare court documents, contemporaneous press reports, secondary reflective sources, and information obtained through the oral history interviews related to specific events and episodes in the case. Comparing these multiple sources and the different perspectives they represented allowed the researcher to make determinations relative to internal criticism.

Evidence, Interpretation, and Narrative

Once the historical researcher has formed the research question, collected sources needed to answer that question, and vetted those sources for authenticity and accuracy, the researcher is ready to begin analyzing the sources. The process of analysis involves searching the sources for evidence related to the research question. The researcher must interpret the evidence and make inferences from it. Finally, the evidence and interpretation is explained in a narrative that answers the research question. This then is the history the researcher produces.[53]

The evidence historians seek in sources comes by way of the facts contained in those sources. Berkhofer wrote, "The ultimate goal of the historical method is to produce facts about past persons, their ideas and actions, their experiences and institutions, and the events involving them."[54] The historian analyzes the facts found in

sources and makes inferences about those facts in an effort to answer the research questions. The inferences and interpretations of the historian are the essence of the historian's work. To simply list events and actions (facts) in chronological order is not history. Making meaning out of facts is the historian's job. Garraghan cautioned against the notion that the facts speak for themselves.[55] Garraghan wrote, "Normal historical writing is … necessarily both factual and interpretive. Facts must be the substantial, the major element of the blend, but interpretation, though supplementary and accessory, is nonetheless indispensable."[56]

Historical researchers must understand the context of sources to properly interpret those sources. Knowing the social, political, and economic climate in which the source was produced is crucial to understanding that source. When considering events, knowing what preceded and followed the event is important.[57]

Two concepts related to context that are important for historical understanding are past-consciousness and present-mindedness. Past-consciousness is an understanding of the past on its own terms. The historian must try to see and understand events of the past as the people who lived then saw and understood those events. People of the past may not have understood their world as fully as we do today, nor may they have interpreted events in the same way that we do, but the historian must resist the urge to project modern interpretations of events onto the people of the past. To do so is to exercise present-mindedness. Present-mindedness is judging the past by current standards.[58] Indeed, current understanding of science and technology may explain processes that may have mystified people centuries ago, but it would be wrong to consider those people ignorant or uninterested in understanding simply because they

lacked the technology and knowledge we have today. Certainly current knowledge is indispensable for interpreting the past, but judging past people and past events by modern standards without allowing for consideration of how those events were understood by the people who lived at that time is to judge the past unfairly.[59] Berkhofer placed the historian as standing between the contexts of the past and present.[60] From this metaphorical middle ground, the historian is able to mentally move back and forth between past context and present context using the perspective offered by each to reach a new understanding about the events under examination.

In this study, the potential for present-mindedness was present in contemporary views of terrorism following the attacks of September 11, 2001. Modern perceptions and understandings of terrorism have been shaped significantly by the 9/11 attacks, so much so that they provide a framework through which to consider and judge all other incidents of terrorism. The researcher had to guard against viewing the Oklahoma City bombing – a preceding event – through such a framework. This was done through developing past consciousness.

Past-consciousness in this study was achieved through the immersion literature and by reviews of the contemporaneous press reports. Consultation of contemporaneous press reports helped the author gain an understanding of how people at the time of the Oklahoma City bombing perceived the event. The unprecedented nature of the Oklahoma City bombing case was consistently reflected in press reports, and it aided the researcher in understanding the uncertainty and concerns surrounding the prosecution of the case – including the focus on fair trial/free press issues raised in the case.

The researcher's interpretation of the evidence culminates often with the narrative. Some historians have used other forms of explaining their analysis, but narrative is the traditional form. Berkhofer called narrative "… the genre of time par excellence."[61] Through the narrative, the historian explains the inferences made from the evidence. Any claims of causation should also be explained. The narrative is the historian's analysis. Nord wrote, "… a narrative is more than a description; it is a logistical organization of material into a chronological sequence for the purpose of explanation."[62] Thus, the narrative brings all of the evidence together to answer the historical research question in a compelling and meaningful manner. It is more than a mere listing of facts and occurrences. It is the story that is the historical account, and, in a narrative form, it allows for literary style that explains the researcher's efforts and interpretations, while hopefully capturing the interest of readers.[63] In keeping with the historical convention of narrative, the researcher used the narrative form in this study.

Summary

Historical research is a well-established, empirical method for producing knowledge. Historical methods provide researchers with tools to systematically and rationally develop research questions, collect sources that will provide data to answer that question, critically analyze those sources, and make inferences to answer the research question. Historical methods allow the researchers to examine past events and offer evidence-based analysis and explanation of those events. Utilizing historical methods in this study allowed the researcher to answer the research questions. The nature of the research questions and the nature of the materials required for answering

those questions, archival materials, made historical methodology the most practical methodology for such a study.

CHAPTER III

Findings

This chapter provides a narrative focusing on the fair trial/free press issues present in the federal prosecution of the Oklahoma City bombing case. The narrative will answer each of the five research questions. These research questions seek to identify which fair trial/free press issues were raised in the bombing case, how the court used precedent in resolving those issues, how resolution of the issues affected management of the case, how closed-circuit broadcasting became a feature of the bombing trials, and how the court's implementation of closed-circuit broadcasting affected its management of the trials.

The narrative is presented chronologically. The chronological presentation makes it possible to identify which fair trial/free press issues came before the court and why they came to the court's attention at that time. The chronological presentation of findings also will show how the court's resolution of fair trial/free press issues affected subsequent decisions and the overall management of the case as it progressed over time. An inductive periodization scheme was applied to the findings to show key turning points in the case that resulted from fair trial/free press decisions made by the courts. Utilizing an inductive periodization scheme allows the researcher to identify key turning points, or periods, in the analysis of source materials, which aids in historical interpretation. The researcher can then organize the narrative chronologically around these periods, which aids in presentation of the findings. Periodization thus aids the researcher in analyzing and organizing the findings, and it aids the reader in understanding the findings presented in the narrative.

Pre-indictment Posturing

At 9:02 a.m. on the morning of April 19, 1995, a 4,000 pound truck bomb exploded outside the Alfred P. Murrah Federal Building in downtown Oklahoma City.[1] In less than two hours, the Oklahoma Highway Patrol had taken Timothy McVeigh into custody on traffic and weapons violations.[2] It would take two more days for the F.B.I. to link McVeigh to the crime and to locate him at the Noble County Jail in Perry, Oklahoma.[3] The F.B.I. would detain Terry Nichols when he voluntarily went to the Herrington, Kansas Police Department and offered to give a statement about his friend McVeigh.[4] By Friday, April 21, 1995, the government had the only two people ever to be tried for the crime behind bars, but due to the scale of the investigation and the legal machinations of attorneys, the suspects would not be indicted and charged with any crimes until August 1995.[5]

During this lengthy pre-indictment period, the press produced hundreds of stories about the crime and the suspects.[6] The defense teams representing the defendants considered much of the information prejudicial to their clients.[7] Thus, the pre-indictment period saw the first emergence of fair trial/free press issues in the Oklahoma City bombing case. The primary issue during this period was prejudicial pretrial publicity. How the defense teams dealt with the publicity would raise another fair trial/free press issue – attorney statements to the press. Both of these issues would eventually lead to court action that affected management of the case. The pre-indictment period was a time of planning and posturing as defense attorneys and the government dealt with the press while awaiting the indictments, and it began with the first court appearance for McVeigh.

Legal proceedings in the Oklahoma City bombing case began on Friday, April 21, 1995, with the initial court appearance of Timothy McVeigh.[8] U.S. Magistrate Ronald Howland of the Federal District Court for the Western District of Oklahoma presided over the proceedings, which took place at Tinker Air Force Base in Midwest City, Oklahoma, because the federal courthouse in Oklahoma City had been badly damaged in the bombing.[9] The attorneys representing McVeigh that evening were Federal Public Defender Susan Otto and Oklahoma City criminal defense attorney John Coyle III.[10] Otto and Coyle would be the first participants to raise fair trial/free press issues in the bombing case.

Otto and Coyle did not want to continue on the case, citing conflicts of interest and questioning whether a fair trial could be had in Oklahoma due in part to the intense press coverage the bombing was receiving. Coyle and Otto had both known people killed in the bombing.[11] The Oklahoma City United States Courthouse, where the trial was likely to take place, had been badly damaged, and court staff had been injured.[12] Furthermore, the press was reporting on the bombing around the clock, and coverage of the crime was almost inescapable.[13] On the Monday following McVeigh's initial appearance, the attorneys filed a motion asking the court to transfer the case to the Tenth Circuit Court for reassignment to another federal district. The attorneys again cited conflicts of interest and press coverage as the basis for their motion.[14]

After filing the motion, Coyle held a press conference to publicly explain why he and Otto wanted off the case and to explain why they had doubts about the future of the case in the Western District of Oklahoma. *The Oklahoman* quoted Coyle as saying:

> I think no matter how fair someone thinks they can be, it's very difficult to be fair in this circumstance when the federal courthouse was [damaged], where rooms where the jurors sit and deliberate in the federal courthouse overlook the A.P. Murrah Building … I can't imagine a situation that would be more prejudicial to someone than that.[15]

On April 26, 1995, U.S. Magistrate Ronald Howland denied the motion. Howland specifically mentioned the concerns about prejudicial pretrial publicity, but he disregarded them. *The Oklahoman* printed an excerpt from Magistrate Howland's order that read:

> It is true that an extensive amount of media coverage has accompanied the bombing of the Murrah Building … This circumstance alone, however, is insufficient to warrant a change of venue, especially at this preliminary and narrowly focused stage of the proceedings.[16]

Even at the earliest proceedings in the case, the enormity of the crime, its impact on the community, and the intense press focus on the crime raised fair trial/free press concerns for defense attorneys. Otto and Coyle had questioned whether the Western District prosecutors and judges could serve as objective participants when the crime hit so close to home. They had also questioned whether the people of Oklahoma could serve as impartial jurors after being subjected to so much press about the case. These were the first fair trial/free press issues presented in the Oklahoma City bombing case. The next group of attorneys to take over the case would continue to focus on these issues, which would dominate the focus of the court through the remainder of 1995.[17]

As Magistrate Howland was denying the request from Otto and Coyle to relieve them of the case and to move the case out of the Western District of Oklahoma, Western District Chief Judge David Russell, the United States Office of Court Administration, and the Department of Justice were conducting a national search for defense counsel and prosecutors.[18] By the end of May, the legal teams were in place. Noted Oklahoma defense attorney Stephen Jones became lead counsel for McVeigh on May 8, 1995.[19] On May 12, 1995, nationally known defense attorney and law professor Michael E. Tigar took over as Nichols's chief counsel.[20] On May 22, 1995, Attorney General Janet Reno appointed Illinois federal prosecutor Joseph H. Hartzler as special prosecutor for the case.[21] These were the leaders of the defense teams and the government's prosecutorial team that would see the case through to trial, and they would address several fair trial/free press issues along the way.

Coyle and Otto had raised the issue of a change of venue. Jones would eventually take up the cause, but Tigar did not – at least initially. Tigar instead sought the disqualification of all judges in the Western District of Oklahoma. Soon after his appointment, Tigar filed a brief seeking the disqualification of Magistrate Howland and Western District prosecutors.[22] The brief cited the damage done to the federal courthouse and injuries federal court employees had suffered in the bombing.[23] Tigar argued that Western District Court judges, prosecutors, and staff were themselves victims of the bombing, and, as such, their impartiality was brought into question. Magistrate Howland disagreed. He ruled that the motion had "no reasonable factual basis," and he denied the motion.[24] The issue was not dead though, and it would come before the court again in the fall of 1995.[25]

Jones initially waivered on the change of venue issue, but by the end of May, he had come to the conclusion that the only way for McVeigh to receive a fair trial was to move the case out of Oklahoma.[26] Jones claimed McVeigh could not receive a fair trial in Oklahoma due in large part to prejudicial pretrial publicity.[27]

Evidence to support Jones's claim came on May 25, 1995, from the governor of Oklahoma – Frank Keating. Prior to entering elected politics, Keating had been an F.B.I. agent, a lawyer, a former United States Attorney, an Assistant United States Attorney General, and a nominee for the Tenth Circuit Court of Appeals.[28] His legal background and his position as the sitting governor made his comments at the May 25 press conference all the more important for the McVeigh and Nichols defense teams in their quest for a change of venue.

At the May 25 press conference, the governor answered reporters' questions about his opinion of the bombing investigation and the trial that would follow. Keating responded by saying, "They got the first creep that did it. It looks like they're moving in on the rest, if they don't have some of them already in their sights, and I think it's great."[29] Keating said he was confident that, "...the very best law enforcement people would find those responsible and they would be prosecuted and hopefully executed."[30] Also, during the press conference, Keating said he thought Oklahomans would be able to keep an open mind about the case and could sit in judgment of the accused. *The Oklahoman* article about the press conference closed with the following sentence: "When a reporter asked with a chuckle if Keating could give 'that creep' a fair trial, the governor said with a smile, 'In my life I gave a lot of creeps a fair trial.'"[31] *Oklahoman* reporter Paul English wrote that Keating's comments bore similarities to President

Richard Nixon's public statements proclaiming his belief that Charles Manson was guilty of the Tate/LaBianca murders while the case was at trial in 1970.[32] Jones did not respond to the governor's remarks immediately, but he would use them in later hearings.[33]

The question of whether the defendants could get a fair trial in Oklahoma was something the press and much of the public were considering in May 1995. The governor of Oklahoma claimed he thought a fair trial could be had in the state, but in making that statement, he had used language that could be considered highly prejudicial. The episode illustrated the intense emotions surrounding the bombing one month after the crime, even at the highest levels of state government. The defense teams would make much of this in their attempts to have the trial moved.

In June 1995, Jones made another attempt to get the trial moved. He wrote to prosecutors telling them that he planned to seek a change of venue if the grand jury indicted McVeigh. Jones extended an offer to the prosecution to negotiate the new venue.[34] In his letter, Jones referenced pretrial publicity and wrote, "To ask citizens of central Oklahoma to sit in judgment with a fair and open mind in view of this unprecedented catastrophic event is asking too much of them."[35] The government rebuffed Jones's offer. *The Oklahoman* quoted Western District U.S. Attorney Patrick Ryan as saying, "While we have seen unprecedented levels of media coverage, that is not tantamount to saying these particular defendants could not get a fair trial before Oklahomans."[36]

Prosecutors stood fast in resistance to any talk of a change of venue. At his swearing-in ceremony on June 26, 1995, Ryan said:

> Oklahoma did not ask for Oklahoma City or the Murrah Building to be the site of this monstrous crime. Others did, and these folks should be brought to trial in Oklahoma City or at least in the Western District of Oklahoma.[37]

Ryan also stated that the Western District had a population of a 1.5 million people, which, in his opinion, could provide an impartial jury. Ryan said he was of the opinion that a change of venue should not be considered until all avenues of seating a jury had been exhausted.[38] According to Ryan, moving the trial out of the Western District would impose an undue hardship on victims, which was something he particularly wanted to avoid.[39] Ryan made it clear that he did not see the massive publicity surrounding the bombing as a detriment to the defendants' rights to a fair trial. Also, he cited a responsibility for making the trial accessible to victims, and he indicated he would only consider a change of venue once it was proven a fair trial in the Western District was not possible. Ryan had brought a new perspective to the ongoing debate over a possible change of venue – the rights of the bombing victims. As the change of venue issue began to build momentum later in the year, the effects such a move might have on the victims became an issue of greater importance. Victims' rights to have access to court proceedings would be a major factor in the government's opposition to a change of venue, and it would be the primary factor in later calls for a closed-circuit broadcast of the trial.

Though Jones had not been successful with prosecutors or the court in his requests for a change of venue, he was making attempts to improve his client's image in the court of public opinion. Jones would take McVeigh to the press and let the defendant speak for himself.[40] Jones's attempts to counter what he perceived as

prejudicial pretrial publicity would become the next fair trial/free press issue in the case, and it would become a recurring issue until the beginning of the McVeigh trial.

In June 1995, Jones arranged the first of several meetings between McVeigh and journalists.[41] Since he first took over the case, Jones had complained that the public was getting a "false impression" of McVeigh.[42] Jones said the public image of McVeigh was that of a stone-faced, shackled inmate being led out of the Noble County Courthouse in Perry, Oklahoma, just before his initial appearance on April 21, 1995. Jones said this was due to the frequency with which television reports about McVeigh relied on the short video clip of the Noble County walkout.[43] In his writings, Jones has often referred to the video and photographs of McVeigh leaving the Noble County courthouse as perhaps the single most damaging instance of prejudicial pretrial publicity.[44] In an interview for this study, Jones reiterated that opinion of the Noble County walkout:

> On a scale of one to ten, with ten being the worst, I'd say it was a fifteen. It was a staged, timed presentation, as I recall, to coincide with the evening news with high drama effects – let the crowd gather. The truth of the matter is that that just wasn't Tim McVeigh. I almost sometimes think it was another person because McVeigh really didn't look like that. All you have to do is contrast the video we took of him five weeks after that. I mean, that's just not Tim McVeigh. But there was just something about the way that he looked, and so forth, that gave this horrendous impression, and of course that was constantly and still is *the* video used of Tim McVeigh, and I think that's what formed people's minds. That was the impression that they had. It was very skillfully done. It didn't happen inadvertently.[45]

The images of that scene were very much in people's minds in June 1995, when Jones first decided to fight back with his own media campaign. Jones claimed the public was hearing and seeing nothing about the true person of McVeigh. Jones often made mention of McVeigh's exemplary military service, including the fact that he had received the Bronze Star during the Persian Gulf War.[46] McVeigh's military service would serve as the impetus for his first arranged meeting with reporters.

The first published interview with McVeigh appeared in the magazine *Newsweek* on July 3, 1995.[47] The authors of the article were David Hackworth and Peter Annin. Annin was the *Newsweek* reporter assigned to cover the Oklahoma City bombing. David Hackworth was a decorated, retired U.S. Army colonel and author, who was then a contributing editor for *Newsweek* specializing in military issues.[48] Jones has written that Timothy McVeigh himself suggested the interview. Jones wrote that during a meeting with McVeigh at the El Reno Federal Prison in El Reno, Oklahoma, McVeigh showed him a letter from Col. Hackworth. The colonel had written McVeigh at the prison asking to speak with him. McVeigh said that he felt he could talk to the colonel as one army man to another. Jones agreed that Col. Hackworth would be a good candidate for the first interview, and he made arrangements to have Hackworth and Annin meet McVeigh at the El Reno prison. The interview took place on June 22, 1995.[49]

The resulting article that appeared in July 1995 did provide a softer image of McVeigh than any prior press reports. Hackworth and Annin described McVeigh as, "... a lot more like a typical Gen-Xer than a deranged loner, much less a terrorist" and "... a more subtle and intriguing figure, at once more clever and ingenuous than his tabloid

personality."[50] The article detailed McVeigh's early years, describing him as an average American youth growing up in upstate New York. Hackworth and Annin also explained McVeigh's military service in detail, including the combat events through which he earned the Bronze Star.[51] The journalists did not, however, shy away from the key question: Did Timothy McVeigh bomb the Alfred P. Murrah Federal Building? McVeigh evaded the question by telling Hackworth and Annin, "The only way we can really answer that is that we are going to plead not guilty."[52]

The *Newsweek* issue featuring the McVeigh interview went on sale on Monday, June 26, 1995.[53] On the Sunday before the *Newsweek* release, Jones conducted what *The Dallas Morning News* called a "public relations offensive."[54] Jones held a press conference at his Enid, Oklahoma, office during which he discussed the forthcoming *Newsweek* story and during which he released more information in an effort to reshape the public image of McVeigh. The materials given to reporters that day included photographs of McVeigh talking with his attorneys in a meeting room at the El Reno prison. These photos were taken by a photographer hired by the defense. Reporters also received approximately five minutes of videotape without audio that showed a similar meeting at the prison. Other information released during the press conference included copies of McVeigh's military records with reviews from superiors and commendations.[55] In explaining his release of the photos, videotape, and military records, Jones told *The Oklahoman*:

> I am hopeful that by releasing this material … and by certain motions that we will file in court that the Niagara Falls of information coming from anonymous sources will be cut off and we can proceed to the prosecution, investigation and

the defense of this case in the manner contemplated by law.[56]

Jones defended himself against accusations that he was trying to influence jurors by saying, "If I were trying to influence potential jurors, I could say a lot more."[57]

Prosecutors provided minimal comment on the *Newsweek* article and the Jones press conference. Western District U.S. Attorney Patrick Ryan was quoted in *The Oklahoman* as saying, "It's an interesting tactic."[58] Western District spokesman Steve Mullins told *The Dallas Morning News*, "We won't try the case in the press. We're going to try the case in the courtroom."[59]

The *Newsweek* article was the first of several meetings between McVeigh and the press. Jones looked to the law and standards of professional ethics in deciding to take McVeigh to the press. Jones claimed that his client had a First Amendment right to speak publicly and that such statements were needed to counteract other press reports that presented McVeigh negatively. For his part, Jones claimed he had a duty as McVeigh's attorney to defend McVeigh in court and in the press.[60] Looking back on the *Newsweek* interview, Jones explained his reasons for reaching out to the magazine in the following way:

> The *Newsweek* interview was a public relations effort on our part, which was negotiated with *Newsweek*. That was our first effort to present Mr. McVeigh as something other than this demon that people had seen walking out of the Noble County courthouse.[61]

How Jones and McVeigh went about dealing with the press in subsequent journalist meetings and interviews with McVeigh would become another fair trial/free press issue raised prior to the trial.

Post-indictment Period

McVeigh and Nichols were finally indicted in August 1995. Once the suspects were indicted and arraigned, the case officially had standing in the Western District of Oklahoma. The posturing of the pre-indictment period turned to action following the indictments. This period would see defense attorneys attempt to both move the trial out of Oklahoma and attempt to remove all Western District judges from the case. Prejudicial pretrial publicity was a significant element in their motions, and the decisions on those motions would have major implications for the future management of the case. Also during this period, the press would enter the picture, seeking access to court records about the case. The press would claim a First Amendment right and a common law right of access to court documents. How the court resolved this issue would have an effect on the future of sealed documents in the case, and it would spawn an ongoing debate over these documents.

On August 10, 1995, grand jury indictments were returned for McVeigh, Nichols, and Michael Fortier.[62] Fortier, a friend of McVeigh's and Nichols's from their time in the U.S. Army, pleaded guilty to four felony counts in exchange for testifying for the prosecution.[63] Fortier admitted to knowing about the bombing plot in advance and failing to report it to authorities. He admitted to lying to investigators and hiding evidence from them, and he admitted to transporting stolen guns used to finance the bombing. Fortier immediately went to prison after entering his plea before Judge David Russell. Fortier and his wife, Lori, would both testify against McVeigh and Nichols at their later trials as part of their agreements with the government. The government gave

Lori Fortier immunity for her testimony, but Michael Fortier would spend almost ten years in federal prison before his release in January 2006.[64]

Following the announcement of the indictments, Stephen Jones and Michael Tigar held press conferences. The attorneys' conduct at this post-indictment press conference was an illustration in miniature of their contrasting views regarding the fair trial/free press issue of how attorneys should deal with journalists in highly publicized cases.

At the August 10, 1995, press conference, Jones presented reporters with documents he said showed evidence of a broader conspiracy involving suspects as yet unknown to investigators. Jones gave reporters packets of documents suggesting an unidentified informant had warned federal officials five months before the bombing that an attack on a federal courthouse in the Tenth Circuit's jurisdiction was imminent.[65] In an interview for this study, Jones described his relationship with the press during the McVeigh case as symbiotic to a degree.[66] Jones said the defense lacked the massive investigative resources of the federal government.[67] It was Jones's hope that by releasing bits of information to the press about the defense theory of the case, the press would investigate those claims and perhaps turn up more information useful to the defense.[68] In this sense, the press could serve as surrogate investigators for the defense.[69] At the same time, any stories done that might reflect positively on McVeigh's background and character would also help defense efforts to rehabilitate McVeigh's image before the public.[70] For these reasons, Jones made himself available to the press often, and he bartered information with the press often.[71] Jones claimed this *quid pro quo* arrangement also gave him leverage to occasionally stop potentially damaging

stories before they were published.[72] Jones recalled one such incident involving privileged defense information he claimed had been inadvertently released to *The Fort Worth Star-Telegram*. Jones claimed he found out the paper planned to run a story based on the information, prompting him to call the editor. Jones offered his account of the conversation:

> The editor came on the line, a woman as I recall, very nice, very professional, and I recited the incident with her. I said, "I'm tired of this, what I consider to be, highly unethical conduct, and I'm not going to tolerate it. So I'm just going to tell you in clear, most unmistakable terms that if you run with this story, you print one word of this, your phone calls will never be returned … never talk again." And I said, "In fact, I've been a pretty good source for you all. Certainly in checking things." And they didn't run the story. They stayed away from it, and I used that three or four times with media that I thought were absolutely irresponsible. Now, had I never been available to the media, then that would not have had the effect that it did.[73]

Michael Tigar's statements on August 10, 1995, illustrated a different strategy. Tigar had generally avoided commenting in the press up to that point, but after the indictment, he spoke with great animation. At the press conference, Tigar emphatically proclaimed his client's innocence. "Terry Nichols is not guilty of the offenses with which he is charged," was one quote attributed to Tigar.[74] Tigar claimed Nichols was not in Oklahoma City at the time of the bombing, and he was not present for other major events prosecutors claimed led up to the bombing. To emphasize his points at the press conference, Tigar held up hand-printed signs. One read, "Terry Nichols Wasn't

There" and two more that read, "What do we want?" "A Fair Trial in a Fair Forum."[75] In an interview for this study, Tigar explained how the dramatic post-indictment press conference fit within his general policy of saying little, if anything, to the press about Nichols:

> We did not want to be nibbled to death by ducks. We wanted to make one statement to all the media – common ground – we wanted to do it under circumstances where people weren't shouting questions at us, and we had no control, and we did have a statement to make. Having made our statement, we could also make clear that we weren't likely to be trying our case in public now. This was the indictment. This was our client. This was the basic theory of our defense. All of those things we were entitled to say, and that was it, you know, it was a one time deal. You didn't see us do it again.[76]

One thing Jones and Tigar did agree on at the post-indictment press conference was the desire to have separate trials for their clients and the desire to have those trials take place somewhere other than in Oklahoma. Jones indicated he would like McVeigh's trial moved to Fort Smith, Arkansas. Tigar, for the first time, said he too would like to see Nichols's trial moved out of state – preferably to Denver, Colorado.[77] Tigar said widespread publicity about the case influenced his opinion that the trial must be moved. Tigar claimed the Nichols defense team had collected more than 1,700 newspaper stories about the bombing published nationwide in slightly more than three months since the blast. He also claimed more than 1,000 of those stories came from Oklahoma newspapers. "In the face of that … media saturation, we would say it is impossible to believe the case could be tried in Oklahoma," Tigar told *The*

Oklahoman.[78] The defense teams would later present evidence to support their claims in what some attorneys considered an unprecedented motion addressing fair trial/free press issues – specifically prejudicial pretrial publicity.[79]

After three months, McVeigh and Nichols had finally been indicted as conspirators in the Oklahoma City bombing. The indictments formally established the case in the Federal District Court for the Western District of Oklahoma. The defense teams were preparing to fight for a change of venue, and their primary evidence for granting a change of venue was pretrial publicity. But the defense teams also wanted to have all Western District judges removed from the case. These two issues were the legal battles that would occupy the court's attention thorough the fall of 1995. How the court resolved these issues would have a significant impact on management of the case, and the decisions would also produce other fair trial/free press issues later on.

The defense teams first took aim at the new judge presiding over the case, U.S. District Judge Wayne Alley of the Western District of Oklahoma. In August, both defense teams filed motions seeking Judge Alley's recusal. McVeigh's attorneys filed the first motion on August 22, 1995, and Nichols's attorneys followed with their recusal motion two days later.[80] In support of their motions, the defense attorneys pointed out the extensive damage done to the courthouse. They cited injuries to courthouse personnel and the fact that a member of the court clerk's staff had lost her daughter in the Alfred P. Murrah Building's daycare center.[81] The defense teams argued that the physical and emotional proximity of the bombing to the federal courthouse and court employees made it impossible to ensure a fair trial for the defendants. They asked Judge Alley to recognize this and to step down.[82]

Prosecutors debated their position on recusal for more than two weeks. Newspaper reports during this period claimed Justice Department officials wanted to ask Alley to recuse, but Western District U.S. Attorney Patrick Ryan did not.[83] Stephen Jones also claimed a rift existed between the Justice Department and Patrick Ryan regarding recusal.[84] On September 8, 1995, the government weighed in with a brief calling for Alley's recusal.[85] Turning to precedent, the brief claimed there had recently been several successful appeals of cases in which the trial courts denied recusal motions. The Justice Department brief read, "There is too much at stake here to risk even an erroneous reversal, with all its attendant costs to the people of the United States, and, most importantly, to the victims of this terrible crime."[86]

In September, Judge Alley denied the recusal motions. *The Dallas Morning News* quoted from the brief in which Judge Alley wrote, "I cannot merely ask another judge to shoulder the burden when the law does not require that."[87] Judge Alley did agree to move the case away from Oklahoma City, but not out of the Western District. His order established a trial date for May 17, 1996, at the federal courthouse in Lawton, Oklahoma. In his order Alley wrote:

> The United States Courthouse in Oklahoma City is too close to the bombing target, the Murrah Building. Jury selection from a pool in the Oklahoma City area would be chancy. I have come to agree with defense counsel on these points. Lawton is close enough to provide a trial setting appropriate for detached and dispassionate deliberation … I have tried cases in Lawton and from those experiences have formed a high regard for the qualities of jurors in that area ...

They have been solid and good people who undertook their juror responsibilities in the spirit of public duty soberly performed.[88]

Though Judge Alley's order did not specifically reference press coverage, it did cite the potential difficulties in seating a jury in Oklahoma City – something the judge said would not be a problem by moving the case to Lawton. The defense teams would challenge this assumption. They would claim that pretrial publicity in Lawton was equally pervasive and that seating a jury there would be equally problematic.[89] Finding out how pervasive press coverage was in Lawton was the focus of the next defense strategy – public opinion polling in advance of a change of venue motion and analysis of press coverage of the crime.[90]

While the defense teams were trying to get Western District judges off the case and to get the case moved out of the Western District, the press was trying to get into court files and to get access to dozens of documents filed under seal. The process of sealing documents would become the next fair trial/free press issue raised in the bombing case. It was also the first issue in which the press became a litigant, and it would become the longest running fair trial/free press issue in the case.

The process of sealing documents had begun early on in the case. Some of the earliest documents the court sealed were the arrest warrant and accompanying affidavits for Terry Nichols. U.S. District Judge David Russell authorized sealing those documents just days after the bombing.[91] Judge Russell and Magistrate Howland allowed for the sealing of dozens of documents during their management of the case through the spring and summer of 1995.[92] The process continued under Judge Alley's tenure.[93] The docket sheet, a chronological index of pleadings filed, gave no

information about what the sealed documents were. The sealed items appeared on the docket sheet as "SEALED (IN VAULT)" along with a corresponding docket sheet number.[94]

On Thursday, September 28, 1995, Oklahoma City television station KOCO filed a motion with the court seeking access to 143 documents that had been filed under seal. KOCO's attorneys claimed many of the sealed documents were search warrants and information on attorney fees. Since the defense teams were being paid with public money, KOCO claimed the public had a right to know how much money was being spent and what it was being spent on.[95] Three days later, more news organizations joined the fight for access to the records. On Monday, October 2, 1995, Tulsa television station KJRH (NBC) and Oklahoma City television stations KFOR (NBC) and KWTV (CBS) along with *The Oklahoman*, *The Tulsa World*, the Oklahoma City and Tulsa chapters of the Society of Professional Journalists, and Oklahoma Freedom of Information Inc. joined the KOCO motion. The attorney representing these press organizations, Mike Minnis, said he feared the sealing of documents could become a standard procedure for the courts if it went unchallenged any longer.[96]

On Friday, November 3, 1995, Magistrate Howland unsealed nine sets of documents totaling more than one hundred pages related to the case.[97] Included in these documents were the search warrant and affidavit for the search of the car McVeigh was driving when he was arrested shortly after the bombing.[98] The documents also revealed the pamphlets and newspaper clippings McVeigh had in his car including the Declaration of Independence and several articles on the F.B.I. siege of the Branch Davidian compound in Waco, Texas two years earlier.[99]

The press had won a small victory in gaining access to some of the sealed court documents. Press attorneys had expressed concern that not challenging the court's procedures would allow those procedures to become entrenched. It would not be the last battle among the government, the defense, the courts, and the press over the fair trial/free press issue of access to court documents.[100]

November and December 1995 would mark key turning points in the Oklahoma City bombing case. In the last sixty days of the year, the defense teams would file motions for a change of venue, implicating the press in their arguments. Judge Alley would be removed from the case, and the press would focus renewed attention on the judge just prior to his recusal. The new judge taking over the case would also come to make fair trial/free press issues his first order of business.

By November 1995, the defense teams had completed their public opinion polling, and they had prepared their motions for a change of venue. The motions claimed pervasive pretrial publicity had made it impossible for McVeigh and Nichols to receive a fair trial in Lawton, and they argued that the court should move the case out of state.[101] In support of their arguments, defense attorneys produced a massive amount of evidence in the form of press clippings and broadcast transcripts. One of McVeigh's attorneys called the motions and their supplementary materials one of the largest legal motions ever filed in the United States.[102] The McVeigh motion had so many boxes of supplementary documents that attorneys had to bring it to the courthouse using hand trucks.[103] An article in the *New York Times* said the boxes contained, "... 1,087 full pages of the Daily Oklahoman, 926 pages of broadcast transcripts, 319 pages of the

Lawton Constitution and 313 pages of the Tulsa World."[104] Government prosecutors, meanwhile, said that they saw no reason to move the trial.[105]

The defense motions for a change of venue revealed some of the polling data, which the court had agreed to fund in September 1995.[106] Stephen Jones hired professors Kent Tedin and Richard Murray from the University of Houston to poll 400 registered voters in four cities within the Tenth Circuit.[107] As registered voters, the respondents were also potential jurors. The cities where the defense experts conducted polling were Lawton, Oklahoma; Denver, Colorado; Albuquerque, New Mexico, and Kansas City, Kansas. The defense teams said the research showed that as much as 90% of those surveyed had already formed an opinion about the case or said they believed McVeigh and Nichols were in fact guilty.[108] In the Lawton sample, 44% said they had formed opinions about McVeigh, and 30% said they had formed opinions about Nichols. Also, 96% of Lawton respondents who claimed to have formed opinions about the case said they thought McVeigh was guilty, and 90% said the same of Nichols.[109] The survey of Lawton area voters found that more than two-thirds of the Lawton area respondents had "made a financial or personal contribution to the victims of the bombing, or knew, or had family or friends who knew someone killed or injured in the bombing."[110] The defense teams were attempting to show that pretrial publicity made finding an impartial jury a daunting task anywhere, but particularly so in Lawton, where the trial was then set to begin in six months.[111]

As the defense teams were hauling their massive motions into the federal courthouse in Oklahoma City, an article appeared in the *The Oklahoman* that would send Michael Tigar dashing off a motion to the Tenth Circuit Court of Appeals.[112] Tigar

had appealed Judge Alley's denial of the recusal motion, and a decision was expected soon.[113] The "new" story was actually a revival of an old story – a story that appeared in an Oregon newspaper the day after the bombing.[114] However, in light of the pending issue regarding who should try the case and where the case should be tried, the old story took on new importance.

The story in question appeared in the Portland, Oregon, newspaper *The Oregonian* on April 20, 1995.[115] *Oregonian* reporter Dave Hogan had discovered that Judge Alley had grown up in Oregon and had begun his law career there. The reporter called Judge Alley just after the bombing and interviewed him by phone.[116] At this time, Judge Alley had no role in the case. The *Oregonian* story included several quotes from Judge Alley's interview. Judge Alley told Hogan that a few weeks prior to the bombing, court security personnel had warned court employees to be on the lookout for suspicious activity. He said they were told to watch for "people casing homes or wandering about the courthouse who aren't supposed to be there, letter bombs. There has been an increased vigilance."[117] The judge also said, "My subjective impression was there was a reason for the dissemination of these concerns."[118] Hogan wrote that Judge Alley also mentioned that his son and daughter-in-law had once considered placing their child – Judge Alley's grandchild – in the daycare center housed in the Alfred P. Murrah Federal Building. The *Oregonian* quoted Judge Alley as saying, "The thought that our grandchild might have been in there was the thing that was most chilling about all of this."[119]

Michael Tigar responded to the *Oklahoman* article three days later. Tigar told *The Dallas Morning News*, "The concerns he [Alley] expressed show that he has an

interest in the case."[120] On November 29, 1995, Tigar filed a copy of the article with the Tenth Circuit as a supplement to his motion. Tigar told *The Tulsa World*, "I think it is fair to say it made our position to the Tenth Circuit better."[121] Reflecting on the incident, Tigar said it is difficult to determine the impact the *Oregonian* story may have had:

> I have no idea whether it was or was not a factor. You know, you don't know what moves judges to make the decisions they do. The fact that his chambers had suffered great damage … the other objective facts … that was all a part of the mix.[122]

The Case Changes Hands

In December 1995, the case would pass to the Chief Judge for the District of Colorado, Richard Matsch. Judge Matsch would immediately face critical fair trial/free press decisions including how to handle the future sealing of documents and whether or not to move the trial away from Lawton. In making these decisions, the judge would look to precedent and evidence of prejudicial pretrial publicity. His decisions would affect the future process for sealing documents in the case and where the trial would ultimately be heard. These decisions would have further ramifications including how the press would cover the trial and how victims would be able to view the trial.

The Tenth Circuit Court of Appeals' decision regarding Tigar's request to remove Judge Alley came on December 1, 1995.[123] It was a victory for the defendants, and it would have a significant impact on the future of the case in the Western District. The appeals court granted Nichols a writ of mandamus ordering Judge Alley to remove himself from the case. The decision, however, made no mention of the interview Judge

Alley had given *The Oregonian*. Regarding Judge Alley, the ruling read, "[Judge Alley's] actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue."[124] Instead, the justices determined the bombing's physical and emotional impact on the Oklahoma City United States Courthouse and its staff were undeniable; furthermore, the justices wrote that there was no other case like the Oklahoma City bombing to look to for precedent.[125] Finally, the justices wrote, "We conclude based on the extraordinary circumstances of this case that a 'reasonable person,' knowing all the relevant facts, would harbor doubt about the judge's impartiality."[126] Thus, the appeals court decided the extraordinary case required an extraordinary decision – to order the judge's recusal.

On December 4, 1995, Judge Alley issued his two-page recusal order. The judge pointed out that the Tenth Circuit decision addressed only the Nichols team's motion; however, he removed himself from the case for both defendants. Judge Alley wrote, "The judge who succeeds to this case will have to bear a dreadful burden, and I wish him or her well."[127]

The judge who would shoulder the burden of the case was U.S. District Judge Richard Matsch, Chief Judge for the District of Colorado.[128] Judge Matsch had a reputation as a firm but fair judge. He was known for being a stickler for rules and procedure, and he was also known for having little patience with attorneys who were not prepared for court or who attempted to grandstand in his courtroom.[129]

Reporters wanted to find out all they could about the judge who would see the case through to trial. Soon after the announcement, several stories appeared about Judge Matsch's background. Many of the stories held Judge Matsch and his courtroom

management style in contrast to California District Court Judge Lance Ito and his management of the O.J. Simpson murder trial that had concluded just two months earlier. Denver attorney Fred Winner told *The Rocky Mountain News*, "Had Dick Matsch tried O.J. Simpson, it would have been over in three weeks. Dick rules his courtroom. When he rules, he rules."[130] Judge Matsch's brother, Charles Matsch, told the Associated Press, "It [the Oklahoma City bombing trial] won't be like the O.J. trial, that's for sure. He's noted for laying out attorneys who play those games and go after each other by stalling."[131] Charles Matsch also said, "His [Judge Matsch's] motivation isn't to seek the limelight. He feels the judicial system needs some dignity restored following the O.J. Simpson trial and believes he can contribute."[132] The judge himself showed some humility and a sense of duty when he told *The Dallas Morning News* shortly after his appointment, "It isn't a matter of wanting it [the case] or not ... I was assigned, and I understand the responsibility of that."[133] *Morning News* reporter Pete Slover also wrote that when asked to elaborate on his judicial philosophy and his experience on the bench, the judge declined and said, "It's not that I'm anti-press ... I'm just guarded."[134]

Stephen Jones and Michael Tigar have both said they hold Judge Matsch in high regard. Reflecting on Judge Matsch, Jones said the judge's dedication to duty and justice, along with his rugged individualist persona, were some of Matsch's more admirable traits:

> Judge Matsch, is, in my opinion, such a unique judge and human being. He's a kind of Gary Cooper type figure. He's just like a figure of the Old West, and so

you sort of knew what he was thinking before he spoke, and you could kind of figure the framework with which he addressed issues.[135]

Tigar also praised the judge for the firm control he kept over the case and focused on Judge Matsch's professionalism in his assessment:

> He's an experienced trial judge who cares about the adversary system. And we'd had the spectacle or the example of the O.J. trial and Judge Ito's lack of control of the process regardless of what you think about the outcome. And I think that everybody was focused on seeing what's Judge Matsch going to do. Well, the fact is that he understood what his job was, and he did it. So, I think he gets an A on his paper.[136]

When asked whether criticism of the legal system following the O.J. Simpson trial influenced the Oklahoma City bombing trials, both attorneys said the specter of O.J. was present in the bombing case, but its effects were minimal. "We weren't interested in battling the image of O.J. or anything cosmic like that," Tigar said.[137] Jones said, "Judge Matsch himself on two or three occasions, in meetings we had that were closed, made reference [to the Simpson trial]. He didn't dwell on it, but you could just tell."[138]

Judge Matsch flew to Oklahoma City on December 12, 1995, to take the bench for the first time in the bombing case, and fair trial/free press issues would occupy much of his first court sessions. At a private conference with prosecutors and the defense teams on December 12, Judge Matsch cautioned the attorneys that they should be careful in their dealings with the press. Following the meeting, Tigar told reporters the judge had "asked counsel to be responsible with respect to our comments to the media.

And you can understand that that is an admonition that we intend to take extremely seriously."[139] Also, during the private meeting, Judge Matsch told the attorneys that he was canceling the May trial date.[140] Whether or not the trial would eventually take place in Lawton was an issue yet to be decided, as there were pending change of venue motions to be heard.[141]

Judge Matsch next turned his attention to the issue of sealed court documents. He kept a December 13, 1995, hearing date originally scheduled by Magistrate Howland to establish a process for filing documents under seal. Judge Matsch, not Magistrate Howland, would decide how much access the press would have to documents through the remainder of the case.

The hearing drew much public and press attention partly because it was the first opportunity for the public and press to see Judge Matsch work in the courtroom. It was also the first time McVeigh and Nichols appeared in a courtroom together since their arrests.[142] At the hearing, Judge Matsch said his first inclination was to leave the documents in question sealed until the trial was over. One report on the hearing quoted the judge as saying, "I'm not accepting the presumption of openness for this matter."[143]

The press motion before Judge Matsch was a combined motion that compiled and consolidated individual motions made previously by multiple media organizations.[144] The petitioners included newspapers, magazines, broadcast stations, and broadcast networks, cable networks, and journalism professional organizations. Newspapers represented in the motion included *The Oklahoman*, *The Dallas Morning News*, *The Philadelphia Inquirer*, *The Philadelphia Daily News*, *The Providence Journal-Bulletin*, *The San Francisco Chronicle*, *The Seattle Times*, and *The Tulsa*

World. The New York Times Company, Washington Post Inc., and Time Inc. joined as corporations. Broadcast stations represented in the motion included Oklahoma television stations KFOR-TV, KJRH-TV, KOCO-TV, and KWTV-TV. Other local broadcasters included KASA-TV (Albuquerque, New Mexico), KGW-TV (Portland, Oregon), KHNL-TV (Honolulu, Hawaii), KING-TV (Seattle, Washington), KMSB-TV (Tucson, Arizona), KREM-TV (Spokane, Washington), KTVB-TV (Boise, Idaho), WCNC-TV (Charlotte, North Carolina), and WHAS-TV (Louisville, Kentucky). Broadcast and cable networks joining the motion were ABC, CBS, CNN, FOX News, and NBC. Journalism professional organizations included in the motion were Freedom of Information Oklahoma Inc., the Society of Professional Journalists Oklahoma City Chapter, and the Society of Professional Journalists Eastern Oklahoma Chapter. The Associated Press was also a party to the motion.[145]

The purpose of the press motion was to unseal all documents the court had previously allowed to be submitted under seal and to establish procedures for filing sealed documents in the future.[146] Press attorneys looked to precedent in preparing their arguments for access to the documents. The press claimed a common law right – established by case law – to the documents and a First Amendment right to the documents by extension of "the qualified First Amendment right of access to court proceedings."[147] Also, the press maintained that the court had not followed the law in its process of sealing documents since the beginning of the case. The motion called the process the court had used to allow documents to be filed under seal up to that point "constitutionally deficient."[148]

The press motion used the Supreme Court cases *Press-Enterprise I* and *Press-Enterprise II* as the foundation for its argument, calling the cases, "…the seminal judicial law on this issue."[149] Press attorneys claimed that in *Press-Enterprise I*, the Supreme Court found a California judge erred in barring the press and the public from jury *voir dire* and in sealing the transcripts of the *voir dire*. The Court ruled that such actions could only be taken "… based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[150] Also, the Court said the press must be allowed to challenge any closure orders. The press motion claimed that in *Press-Enterprise I*, the Court determined preserving openness in the criminal justice process is vital to preserving public confidence in the system.[151]

Turning to *Press-Enterprise II*, the press claimed that courts must show how a defendant's right to a fair trial would be threatened before issuing a closure order. *Press-Enterprise II* was another California case in which a trial judge closed a pretrial hearing and sealed transcripts over press objections, saying the publicity of the proceedings would deny the defendant the right to a fair trial. The Supreme Court, however, ruled that the trial court did not sufficiently demonstrate a threat to the defendant's rights.[152]

Citing precedent, the press attorneys claimed the standards established by these cases allowed for closure only when the court could show a compelling interest in closure, the closure was necessary to protect that interest, and there were no other means less severe than closure that could protect the interest.[153]

While *Press-Enterprise I* and *Press-Enterprise II* primarily focused on a right of access to court proceedings, the press motion claimed that subsequent lower court

decisions created a common law precedent of access to court documents and extended the provisions of these Supreme Court cases to include documents. Press attorneys wrote:

> Every Circuit Court of Appeals which has addressed the issue has held that the First Amendment right of public access to criminal proceedings also applies to documents submitted in connection with those proceedings. The First Amendment qualified right of access applies generally to documents and records in all criminal proceedings, specifically including [among other things] documents relating to pretrial detention (bail) proceedings, documents relating to criminal pretrial suppression proceedings, documents relating to plea agreements, records of plea and sentencing hearings, documents relating to the trial judge's decision to recuse, or relating to disqualification, documents supporting issuance of search warrants, and to a motion to reduce sentence and related documents.[154]

Press attorneys argued that the public, including reporters, had a right of access to court documents. Should any party wish to seal documents, the press argued, the court must notify the public of that request and allow for a hearing on the issue.[155] Press attorneys claimed the public had a right and a need to know what happened in criminal prosecutions, particularly the Oklahoma City bombing prosecution. The motion stated:

> This proceeding involves prosecution of the persons charged with what has been referred to as the most egregious act of terrorism ever committed in the United States. The public's interest in asserting the constitutional right of access could not be more heightened.[156]

The defendants responded to the press motion by recognizing a common law right to court documents but rejecting the press claims that the Supreme Court and appellate court decisions established a constitutional right of access to documents. The defense position was that unsealing such documents could reveal evidence that may not be admissible at trial, and such information could expose trial strategy, thus jeopardizing the defendants' right to a fair trial.[157] The defense maintained that the documents had been sealed to protect the defendant's rights to a fair trial, and, to that end, those documents should remain sealed.[158] McVeigh's attorneys expressed particular concern with the press's interest in unsealing documents related to attorney payment. Stephen Jones said that these documents made up a majority of the documents the court had sealed up to that point and that the press had specifically expressed an interest in those documents.[159]

As indigent capital defendants, unable to pay for their own defense, McVeigh and Nichols received payment for attorney services through the federal government as provided by the Criminal Justice Act.[160] Due to the fact that public money was funding the defense, the press argued that the public had a right to know how much public money the defense teams were spending.[161] Under the Criminal Justice Act, defendants filed schedule forms for payment that detailed what types of services they sought and how much those services cost. Services could include, but were not limited to, travel, hiring analysts and consultants, and conducting tests.[162] Both the McVeigh and Nichols teams argued that these documents were "attorney work product" and thus they were outside the scope of what should be considered publicly accessible court documents.[163] Furthermore, the defendants argued that the Criminal Justice Act included provisions

specific to capital defendants to maintain the confidentiality of these documents. Jones wrote, "Unsealing these documents would not only divulge attorney work product but also give a 'blueprint' of the defense strategy."[164]

Along with a concern about revealing strategy, the defense teams had a concern that publication of the overall cost of the defense could inflame public sentiment against them and have a further negative impact on the defendants' rights to a fair trial.[165] The press motion conceded that revealing specifics about what types of activities the defense sought payment for could expose defense strategy.[166] Still, press attorneys argued they should be able to learn how much was being spent in the aggregate, even if specifics of what the funds were used for were still kept under seal.[167] Judge Matsch took oral arguments from the hearing and related motions under advisement and said he would issue his ruling in January.[168]

The fair trial/free press issue of sealed documents, first addressed in November 1995, had reemerged in December 1995. Press attorneys turned to precedent to assert a right of access to the documents then held under seal. Defense attorneys rejected this argument. They claimed federal statue protected the documents journalists were most interested in –documents related to attorney's fees. The defense teams also claimed that giving the press access to such documents would have a negative impact on the defendants' Sixth Amendment rights to a fair trial. Here the First Amendment rights of the press and the Sixth Amendment rights of the defendants were in clear conflict. It would not be the last time the court would consider the issue.

The change of venue issue was the next fair trial/free press matter to be addressed before Judge Matsch. On Thursday, December 21, 1995, the government

filed its response to defense motions for a change of venue. Like the defense teams, prosecutors included hundreds of newspaper clippings related to the bombing, but unlike the defense teams, prosecutors claimed their evidence showed a fair trial in Oklahoma was possible.[169] True to their earlier position, prosecutors claimed the trials should take place in Oklahoma to accommodate victims and their families. The government also offered a new location as an alternate should Lawton prove impractical; that new city was Tulsa, Oklahoma.[170]

As Oklahoma's second largest city, Tulsa had capabilities for a large trial that no other city outside of Oklahoma City could offer. Tulsa had two federal courthouses. In 1995, the older of the two courthouses had just reopened after a remodeling project, which included prisoner-holding cells with showers and a courtroom expansion that made the largest courtroom capable of holding 200 spectators. The old Tulsa federal courthouse also had several vacant rooms that could be utilized in a variety of ways, including attorney offices, court staff offices, or media workspace.[171] Furthermore, prosecutors claimed Tulsa offered greater access for victims and witnesses.[172] Prosecutors pointed out that the defense polling research had not included polling in Tulsa. The prosecution questioned the validity of the defense research because Tulsa was not taken into consideration.[173]

As 1996 began, the Oklahoma City bombing case had a new judge with two major fair trial/free press issues before him – deciding how to handle sealed court documents and whether or not to move the trial to another venue. These two issues would occupy the court's attention through the month of January. The court dealt with the sealed documents issue first.

On January 24, 1996, the judge made his decision on the sealed documents issue by issuing an order that would guide the future of sealed documents throughout the rest of the proceedings.[174] In his written opinion and order, Judge Matsch ruled that attorney fee records would remain closed, and he established procedures for future documents to be filed under seal. He also set forth a classification system that would allow for brief descriptions of sealed documents on the docket sheet, so as to give an indication of what was contained in the documents, while still protecting the information under seal.[175] In this order, the court recognized the fair trial/free press issue of sealed documents. The court turned to precedent to resolve the issue, and how the court resolved the issue would establish procedures for managing sealed documents through the remainder of the case.

The judge wrote that the Supreme Court had recognized a common law right of press and public access to court records. However, he also wrote that the Court recognized the authority of trial courts to exercise discretion in determining whether or not to make records public when questions arose about whether release of those records might impact a case or participants in the case.[176] The judge looked to precedent for his order, and found it in *Press-Enterprise II* – one of the cases press attorneys had used to vociferously argue for access to the documents. Specifically, Judge Matsch referred to the "experience and logic" test articulated by Chief Justice Burger in his *Press-Enterprise II* majority opinion:

> These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes the tests of experience and logic, a

> qualified First Amendment right of public access attaches. But even when a right of access attaches, it is not absolute ... While open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to fair trial might be undermined by publicity. In such cases, the trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access.[177]

Judge Matsch claimed that the need to avoid prejudicial pretrial publicity was an important interest, but not the only interest the court should consider when deciding to seal documents. The judge wrote that protecting information about victims could be a legitimate cause for limiting public access to information. Also, Judge Matsch pointed out that the timing for the release of information must be considered. "The stage of the proceeding may determine the question of access," the judge wrote.[178] Finally, the judge rejected the press argument that appellate courts have recognized a right of access to a litany of document types and that sealing such documents must, in all cases, involve a showing of the need for such action. Judge Matsch wrote, "That suggested method of analysis is both an overstatement of the qualified right of access and an oversimplification of the manner of its application."[179] Specific to the documents regarding attorney fees, the judge wrote that such records had never been considered records to which the public had a right of access. Furthermore, he asserted that federal law and court rules specifically stated such records were to be protected from public scrutiny.[180]

Judge Matsch then explained a five-part test that he would use to determine if documents then already sealed would be opened. The test would also serve as the procedure for handling sealed records for the duration of the case. The five questions posed in the test were:

> Does the matter involve activity within the tradition of free public access to information concerning criminal prosecutions? Will public access play a significant role in the activity and in the functioning of the process? Is there a substantial probability that some recognized interest of higher value than public access to information will be prejudiced or affected adversely by the disclosure? Does the need for protection of that interest override the qualified First Amendment right of access? Is the closure by the court essential to protect that interest, considering all reasonable alternatives?[181]

With his five-part test crafted from the experience and logic test established, the judge applied the test to the sealed document issues at hand, beginning with the issue of attorney fees. The judge wrote that the public interest in public funds spent on representing the defendants was legitimate and unquestioned; however, he wrote, "...there are important interests to be protected before the entry of final judgments in this case."[182] Judge Matsch claimed it would be inappropriate to release information that could reveal defense strategy. Along the same lines, he wrote there was a legitimate interest in protecting the identities of witnesses and experts who had talked to or were working with the defense. Another interest the judge cited was "the protection of counsel from vilification and accusations of improper motivations."[183] Judge Matsch wrote that professional standards and court rules prohibited attorneys from speaking on

some issues that would arise in a discussion of how the defense teams were using court approved funds. This would place the attorneys in a difficult position, and it might distract them from their primary task of focusing on the defense of their clients, the judge determined. He wrote that the alternative suggested by the press of revealing only aggregate amounts spent on the defense was not a viable option because without explanation of what the funds were used for, the aggregate amounts would lack context. Thus, Judge Matsch ruled that all documents related to attorney fees already under seal, and all future documents to be filed related to attorney fees, would be sealed until final judgment in the case.[184]

To address the concern about nondescript docket sheet entries, Judge Matsch ordered all attorney fee documentation to be entered with the defendant's name and a brief, general description such as, "'application for interim fees for counsel,' 'application for travel,' etc."[185]

Judge Matsch ruled that in the future no other documents, other than attorney fee documents, would be "sealed automatically."[186] He ordered that any party wishing to file a document under seal would have to file a motion to that effect. The motion would be open to the public, but the documents in question would be under seal until the judge ruled on the motion. Except in the case of an emergency, the court would allow three days for objections to be filed regarding the request to seal, after which the court would consider the motion.[187]

Judge Matsch had addressed the fair trial/free press issue of public access to sealed court documents by crafting a procedure based on precedent. The press had raised the issue out of concern the court was acting arbitrarily in sealing documents, and

that posed a threat to First Amendment rights of access to public information. Using the precedent of the experience and logic test, the judge established a procedure all parties could understand for dealing with future issues. Judge Matsch claimed his procedure equally considered the press's First Amendment rights to report on the case while protecting the defendants' Sixth Amendment rights to receive a fair trial. The procedure would be used throughout the case, but it would not go unchallenged. The issue of sealed documents would be one of the longest-lived fair trial/free press issues in the case.[188]

Reflecting on Judge Matsch's management of the sealed document issue, both Stephen Jones and Michael Tigar said Judge Matsch's procedure was legally sound, and it rightly protected the most sensitive documents – those related to attorney fees. Jones said the judge's decision averted what could have been a public relations nightmare for the defense:

> I think Judge Matsch was legitimately concerned that the amount of money the defense was spending would be demonized – to use one of his expressions – and the defense lawyers would be accused of lavish spending or unnecessary spending. That would not only damage them publicly, that is to say in the eyes of the potential jury, but also damage indirectly Mr. McVeigh. It might also have a morale effect on the defense, and, finally, might also discourage people from assisting the defense. By people, I mean experts and people that we would pay. He addressed those quite candidly.[189]

In his assessment of the sealed documents order, Michael Tigar said Judge Matsch correctly applied precedent, and, in doing so, he came to a legally sound decision:

> The law respecting the sealing of documents is pretty clear. First, the person seeking them has to show that there was a common law right of access to that kind of document. Which then if there is, leads to a presumptive First Amendment right of access. That's the formula, and here of course these were largely, if not almost entirely, discovery documents, which the Supreme Court had held are not subject to a common law right of access.[190]

One week after Judge Matsch addressed the issue of sealed documents, the focus shifted to the fair trial/free press issue that had loomed over the case since McVeigh's initial court appearance – the change of venue. Judge Matsch scheduled a hearing on the issue to begin Tuesday, January 30, 1996, at Oklahoma City's federal courthouse.[191] The hearings attracted a large crowd of reporters and bombing victims. Some victims waited outside the courthouse before dawn to ensure they would get a seat in the courtroom.[192] Judge Matsch had previously agreed to establish an audio feed to an adjacent courtroom in case some victims could not get a seat in the gallery.[193] While the equipment for the audio feed was put in place, the auxiliary courtroom was not used during the change of venue hearings.[194]

The hearings spanned four days and focused largely on public opinion polling and press coverage of the bombing.[195] Both the government and the defense teams came prepared with research on the attitudes and opinions of potential jurors. Both sides also came prepared with hundreds of newspaper clippings and multiple videotaped broadcast reports on the bombing and its impact on the city and state. The four days of hearings played out in a courtroom filled with bombing victims and members of the defendants' families.[196]

The government took the position that the people of Oklahoma should be allowed to have the case tried in their state.[197] Prosecutors knew the defense would seek to show that local sentiment for the bombing victims made all residents of the state victims of the bombing. U.S. Attorney Patrick Ryan challenged that position in his opening statement. Ryan said, "…the defendants have not, cannot and will not prove the State of Oklahoma can't find 12 people and 6 alternates to make a fair and impartial jury."[198] Prosecutors also maintained that moving the trial outside of Oklahoma would place an undue hardship on victims, and it could violate their rights under federal crime victim statutes.[199]

The prosecution called the first witness in the hearings, Dr. Donald E. Vinson.[200] Dr. Vinson was the chairman of a jury consulting service called DecisionQuest based in Los Angeles, California. Under Vinson's direction, DecisionQuest surveyed registered voters in Lawton, Oklahoma; Tulsa, Oklahoma; Albuquerque, New Mexico; Denver, Colorado; and Kansas City, Kansas to assess their attitudes and opinions about the bombing defendants and the crime itself.[201] This study showed 40% of those polled in Tulsa said they believed McVeigh was guilty, 36% of those polled in Albuquerque and Kansas shared the same opinion, and 28% of those polled in Denver believed the same.[202]

Dr. Vinson's firm, DecisionQuest, had consulted for other famous trials including the O.J. Simpson murder trial.[203] Vinson testified at the venue hearing that Oklahomans asked about the Oklahoma City bombing case actually showed less bias against the defendants than Californians had shown toward O.J. Simpson prior to his trial.[204] Vinson testified that approximately 60% of those surveyed in Lawton said they

were unbiased regarding Timothy McVeigh, and 73% of Lawton respondents said the same for Nichols.[205] In the Tulsa sample, the number claiming to have no bias against McVeigh slipped to approximately 59%, but it rose to 75% regarding Nichols.[206] Vinson said all of those percentages were higher than the 42% of Los Angeles respondents who said they had no bias toward O.J. Simpson just before his murder trial began.[207]

During cross-examination, the defense teams questioned Vinson on what defense attorneys considered problems and inconsistencies in the data. During questioning, Vinson said his research showed that Lawton residents who said they thought McVeigh was guilty reported they held that belief "significantly more strongly" than respondents from the other cities studied.[208] Defense attorneys and Judge Matsch both asked Vinson about apparently contradicting statistics showing that 85% of Lawton and Tulsa residents thought McVeigh and Nichols were presumed innocent, while 30% said the pair was guilty. Vinson responded by saying, "They're [the statistics] inconsistent in that respect, and you have to be careful about that."[209] Still, Vinson said he thought both defendants could get a fair trial in Oklahoma whether the trial was held in Lawton or Tulsa, but he also said attorneys would have to take their time and be thorough when questioning potential jurors during jury selection. Vinson added that, in his opinion, attorneys would find potential jurors with strongly held opinions and emotions about the case, "'irrespective of where this case is tried – whether it be in Lawton or Timbuktu.'"[210]

The McVeigh team had earlier commissioned research of its own. The McVeigh team's polling, conducted by Drs. Richard Murray and Kent L. Tedin of the University

of Houston, claimed to show clear differences between prospective jurors in Oklahoma and other states.[211] The McVeigh team's thesis was that Oklahomans held stronger opinions about the case than people in other states due in large part to pervasive press coverage in the state. Also, both defense teams claimed press coverage was often biased against the defendants.[212]

The McVeigh team's polling showed knowledge of the crime and knowledge of the two defendants was much higher in Lawton than in other Tenth Circuit cities included in the polling.[213] More than 80% of the Lawton respondents could name the suspects without help, compared to fewer than 50% of respondents from outside Oklahoma.[214] Oklahomans also appeared to follow news of the bombing more closely than people outside the state. Sixty-seven percent of people polled in Lawton said they paid "a 'great deal' of attention to news of the bombing."[215] No more than 46% of respondents from any other city reported paying a great deal of attention to news about the bombing. The defense also claimed that Oklahomans were more likely to be associated with the bombing victims or relief efforts than people in other states.[216] Finally, the defense study asked if respondents had already formed opinions about the guilt of the defendants. The research showed the Lawton sample had formed opinions about the defendants – particularly regarding McVeigh. In Lawton, 44% said they had formed an opinion about McVeigh's guilt, and 96% of that group said they felt certain of McVeigh's guilt. In Kansas City, 37% of those holding opinions about the case said they felt certain of McVeigh's guilt.[217] In Albuquerque, the number was slightly higher, 39%, and in Denver that number was 40%.[218] The defense claimed Oklahomans held such strong opinions about the case not just because of their physical and emotional

proximity to the crime, but also because the press in Oklahoma kept the case in the forefront of public consciousness, and, more often than not, with a bias against the defendants.[219]

The second focus of the defense teams during the hearing was to show the court what the defense claimed was evidence of pervasive press coverage from the Oklahoma press corps. The supplementary information filed with the original change of venue motions included hundreds of newspaper clippings and hours of video coverage of the bombing that spanned the time period from the day of the bombing through October 1995.[220] For expert testimony on press coverage, the Nichols team called Scott Armstrong, a former *Washington Post* reporter, author, and journalism professor.[221] Armstrong testified that the amount of press coverage of the bombing in Oklahoma far exceeded similar coverage offered by media outlets outside the state.[222] Defense evidence showed Oklahoma media outlets produced bombing stories at a ratio of five-to-one compared to Denver media outlets in April 1995, and the ratio had increased to seven-to-one by October 1995.[223] Furthermore, the defense argued that the Oklahoma press reports were lengthier and focused more on victims and seeking justice for those victims compared to national press coverage and coverage by media outlets in other states.[224] The Nichols team claimed the press helped create a sentiment among the people of Oklahoma that all residents of the state were victims through a shared sense of sympathy for the victims.

Both defense teams argued that much of the press coverage concerning the bombing was plagued by inaccuracies and biased accounts that put the defendants in a bad light. Armstrong told the court that in his opinion, "more neutral coverage is almost

assured anywhere other than Oklahoma."[225] During part of the hearing, the court allowed several broadcast reports to be played. Reporters covering the hearing noted the emotional impact the videotapes had on victims attending the hearing. Several of them wept, and one report said, "One woman rushed from the courtroom in tears."[226]

One piece of evidence Stephen Jones has singled out as being critical to the defense argument was a series of broadcast reports McVeigh attorneys put together featuring Oklahoma Governor Frank Keating, commenting on the bombing and the bombing defendants.[227] The video compilation played in court included the governor's May 25, 1995 comments from the press conference.[228] Jones wrote that both defense teams recognized the importance of statements made by the highest ranking elected official in the state, and both defense teams agreed to begin their presentation of evidence with the videotape containing a compilation of the governor's statements.[229] Jones wrote in retrospect, "I was confident, once we were done with the governor, that the game [change of venue] was done."[230] Jones reaffirmed his position that the governor's comments were important evidence in an interview for this study:

> Governor Keating felt very strongly about the bombing. That was the very early part of his term, which was eight years, and I don't think people had picked up on the idea that the governor was very volatile in his language and would talk before thinking what it sounded like. So, I think the right strategy was made. We made the point with the video that the governor was making statements that were highly damaging to get a trial there in Oklahoma.[231]

The Nichols defense had its own evidence of alleged prejudicial pretrial publicity. Ironically, the publicity in question happened during the change of venue

hearing. For the first two days of the hearings, U.S. Marshals had allowed news photographers to take still pictures and video of McVeigh and Nichols exiting the jail and getting in the vehicles that drove them to the courthouse.[232] On the second day of testimony, Michael Tigar began the hearing by voicing his objection to the photography. Pictures published in *The Oklahoman* that morning showed both defendants wearing bulletproof vests and handcuffs. The photographs appeared next to an article about the change of venue hearing.[233] Tigar told Judge Matsch that previous courts had ruled pictures of defendants in handcuffs could be considered prejudicial, and he said he might later use the recent photos and video as evidence.[234] Jones said revelations of the jail photo opportunity greatly upset Judge Matsch. "The judge absolutely just went ballistic when he found out," Jones said.[235]

At the time of the hearing, *The Oklahoman* reported U.S. Deputy Marshal Jamie Hughes acknowledged the Marshal's Service had arranged the photographer access as "… a compromise after reporters claimed that authorities could not block access to the public entryway."[236] After Tigar brought the matter to the court's attention in the morning session, Judge Matsch spoke with U.S. Marshal Pat Wilkerson during the lunch break. Judge Matsch opened the afternoon session by saying the situation was resolved, and there would be no more photographs or video taken at the jail.[237]

As the hearing progressed, it appeared more likely that the trial would not be held in Lawton.[238] During testimony on Wednesday, January 31, 1996, Judge Matsch stopped witness testimony and questioned attorneys after hearing evidence that the largest federal courtroom in Lawton would likely not provide enough room for prosecutors and both defense teams inside the courtroom, let alone the public and the

press who would want seats in the gallery.[239] The judge showed further concern when prosecutors told him it could take as much as $1 million to make the courthouse ready for a trial with the size and complexity of the bombing trial.[240] Judge Matsch said from the bench that it appeared the Lawton facilities had "obvious deficiencies," and he added, "It seems to be a waste of a lot of people's time and energy to make it [Lawton] available as a feasible trial site."[241]

On Friday, February 2, 1996, prosecutors and defense attorneys made their final arguments on the venue issue before Judge Matsch. Prosecutors asked the judge to consider the victims and to keep the case in Oklahoma by moving the trial to Tulsa. Assistant U.S. Attorney Sean Connolly said, "Tulsa honors the victims' rights in a way no out of state venue could."[242] U.S. Attorney Patrick Ryan continued the theme of compassion for victims and brought a measure of emotion to the proceedings. Press reports said Ryan choked back tears as he made a plea for the court to consider the children of bombing victims. Ryan said those children were already living without one parent, and if their surviving parent had to travel to an out-of-state trial, the stress on the family might be overwhelming.[243] Ryan said, "There are literally thousands of children who lost a mother or a father … Those thousands of children don't need their parents flying to Denver … They need their parents here."[244]

The defense teams acknowledged the great emotional toll the bombing had taken on the victims, but they maintained the venue decision should be based on the law, and the court should equally consider the rights of the defendants. Michael Tigar told the court:

> We neither discount nor deny the grief and anger of the victims or even their desire for vengeance … But when we bring Terry Nichols to the court to decide whether he will live or die, it is in our best interest to create a sanctuary in the jungle.[245]

Stephen Jones also said Tulsa was not a viable venue. He returned to the defense position taken throughout the hearing that all Oklahomans were victims of the bombing. Jones told the court, "There is not an independent republic of Tulsa … for our people, April 19 in this state will be the equivalent of Pearl Harbor Day. It will be the event by which time is measured."[246] With that the hearing ended, Judge Matsch announced he would make his decision in February.

Bombing victims were not waiting for the judge's decision. They suspected the trial would likely be moved, and they suspected it would be moved to Denver. Anticipating the problems such a situation posed for victims wanting to watch the trial, a small group of victims decided to take action. They turned to an Oklahoma City attorney named Karen Howick and began devising plans to have the trial broadcast to Oklahoma City via television, if a change of venue were granted. This was the beginning of the most unique fair trial/free press aspect of the Oklahoma City bombing case – closed-circuit broadcasting. It was an unprecedented feature for a federal criminal trial, and it would become a major fair trial/free press issue before the court. The court's decisions about closed-circuit broadcasts would have a direct impact on how it managed the case leading up to and through the trials.

Karen Howick became involved in the bombing case through her secretary, Rhonda Bratlebaugh, whose sister had been killed in the bombing.[247] Howick told *The*

Dallas Morning News that she saw an opportunity to help the victims and the people of Oklahoma by leading the effort to make the proceedings as accessible as possible for victims who could not go to Denver to see the trials first-hand.[248] Howick had been exploring options for broadcasting the trials in some fashion even before the change of venue hearings. By February 1996, she claimed to be representing thirteen bombing victims in an effort to have the trial broadcast. She also claimed to have a commitment from Court TV to arrange a secure feed to Oklahoma City, and she claimed to have talked to Oklahoma United States Senator Don Nickles about options for federal legislative assistance in securing a closed-circuit broadcast.[249] Should Judge Matsch decide to move the trial, Howick argued the court should accommodate victims with a closed-circuit broadcast.

The Case Moves to Denver

In late February 1996, Judge Matsch made his decision on the change of venue motions. The judge looked at the evidence and decided there was indeed a substantial amount of prejudicial pretrial publicity. Citing the evidence more than precedent, the judge made the decision to move the trial to Denver. This decision would have an effect on several fair trial/free press aspects of the case including how the press would cover the future trials and victim requests for closed-circuit broadcasts of the trial.

On February 20, 1996, Judge Matsch filed his decision on the change of venue issue. The opinion relied not so much on precedent as it did the specific evidence presented at the hearings and the judge's experience and discretion. In his decision, Judge Matsch granted the defense request for a change of venue writing, "...this court finds that there is so great a prejudice against these two defendants in the State of

Oklahoma that they cannot obtain a fair and impartial trial at any place ... in that state."[250] Judge Matsch wrote that the press had "demonized" the defendants.[251] The opinion devoted considerable attention to evidence and testimony offered at the hearing regarding press coverage of the case. Of the thirty-three paragraphs in the sixteen-page order, fourteen paragraphs were devoted to discussion of pretrial publicity generated by the press.[252]

Judge Matsch pointed out significant differences between Oklahoma media and out-of-state news organizations in their coverage of the bombing and its aftermath, as testified to by Scott Armstrong. First, the judge wrote that the number of bombing stories produced nationally peaked and then declined in the weeks after the event, but in Oklahoma, the number of bombing related stories remained comparatively high from April 1995 through the fall of 1995.[253] He wrote that this was understandable because Oklahomans had a greater need for information about the crime and its impact. However, Judge Matsch determined that the Oklahoma press had focused a great deal of attention on the victims of the crime and the impact the bombing had on the people of Oklahoma.[254] This, the judge wrote, produced a sense of kinship between the victims and other Oklahomans. Judge Matsch wrote, "Indeed, the 'Oklahoma Family' has been a common theme in the Oklahoma media coverage, with numerous reports of how the explosion shook the entire state, and how the state has pulled together in response."[255]

Judge Matsch determined that the theme of Oklahoma press coverage contrasted greatly between the victims and the defendants. While stories about victims emphasized their innocence, the judge claimed stories about McVeigh and Nichols did the opposite.[256] Judge Matsch referenced repeated stories in which video of militia training

exercises accompanied stories about the defendants, suggesting a link between McVeigh and Nichols and right-wing extremist groups.[257] The judge also mentioned the video and photographs taken of McVeigh and Nichols being transported to the venue hearings as an example of possible prejudicial press coverage. The judge made particular note of the video of McVeigh leaving the courthouse in Perry, Oklahoma, writing that the video had been, "... used regularly in almost all of the television news reports of developments in this case."[258]

Judge Matsch was dismissive of the opinion polls conducted by both the government and the defense teams. He wrote:

> The possible prejudicial impact of this type of publicity is not something measurable by any objective standards ... surveys are but crude measures of opinion at the time of the interviews. Human behavior is far less knowable and predictable than chemical reactions or other subjects of study by scientific methodology. There is no laboratory experiment that can come close to duplicating the trial of criminal charges. There are so many variables involved that no two trials can be compared regardless of apparent similarities. That is the very genius of the American jury trial.[259]

Judge Matsch's strongest criticism of the polling research was based on the fact that it did not take into account the complexities of a capital case.[260] He was specifically addressing the two-phase process of capital trials and the tasks placed before jurors in each phase. In the first phase, jurors must decide if the evidence presented is sufficient to convict the defendant of the capital offense. Here, jurors make their decision based on rational and impartial consideration of the evidence and the law. If the accused is

found guilty, the trial moves to the second phase, which is the punishment phase. In the punishment phase, jurors must consider evidence of aggravating factors and mitigating factors to reach a moral judgment regarding whether or not the defendant should receive the death penalty. Judge Matsch determined that the polling research focused on questions of "fairness and impartiality" – questions perhaps sufficient for the task before jurors in the first phase, but insufficient for the task before jurors in the second phase.[261] Because the death penalty was a possibility in the case, the judge wrote that the court had to consider "the predilection [in Oklahoma] toward that penalty."[262] The judge cited the press in assessing sentiments about punishment for anyone convicted of the bombing. Matsch wrote:

> Most interesting in this regard is the frequency of the opinions expressed in recent televised interviews of citizens of Oklahoma emphasizing the importance of assuring certainty in a verdict of guilty with an evident implication that upon such verdict death is the appropriate punishment.[263]

In regard to the victims, Judge Matsch wrote that he recognized the difficulties they would face with a trial held in Denver, Colorado. The judge claimed the government met the requirements of federal crime victims' statues by providing victims with information about developments in the case though the Victim Assistant Unit of the Western District U.S. Attorney's Office.[264] In conclusion, Judge Matsch wrote, "The interests of the victims being able to attend this trial in Oklahoma are outweighed by the court's obligation to assure that the trial be conducted with fundamental fairness and with due regard for all constitutional requirements."[265]

Judge Matsch had decided to grant the change of venue requests, and the press played a significant role in his decision. The judge found pretrial publicity in Oklahoma was prejudicial, so much so that the defendants' rights to a fair trial had been damaged. Based on the evidence, he concluded that the pretrial publicity in Oklahoma was different than in other media markets. Oklahoma coverage focused more on the victims, their emotions, and the impact of the crime. Because of this, Judge Matsch claimed that the people of Oklahoma had become galvanized in their support for the victims and that the defendants had become "demonized" in the eyes of the public.[266]

Reflecting on the change of venue order, both Michael Tigar and Stephen Jones said it was the correct decision in their opinions. Both attorneys also said they thought the jail photo opportunity incident was a critical factor in that decision. In explaining the decision, Michael Tigar said testimony about the press given in court and the actions of the press outside court were both critical factors:

> Two main things it seems to me did it. One was the testimony of Scott Armstrong that Judge Matsch spent a lot of time discussing, which analyzed media coverage … and the second thing was when the local Oklahoma authorities [with the cooperation of U.S. Marshals] permitted Terry to be photographed in handcuffs and chains.[267]

Stephen Jones agreed with Tigar's assessment that the jail photo opportunity was a deciding factor:

> I'm not so sure that the judge was neutral or fifty-fifty on the change of venue and that alone [the jail photos] didn't change his mind – that he just saw this as going to be a media circus. When you saw that, what you thought of was Jack

Ruby and Lee Harvey Oswald. That was the worst public relations blunder the government could have made.[268]

Change of Venue Effects

The fair trial/free press issue of pretrial publicity had played a significant role in the change of venue decision, and in late February 1996, the Oklahoma City bombing case was headed to Denver. The move accelerated efforts to establish a closed-circuit broadcast of the future trials. The closed-circuit issue would dominate the headlines for the next month, and it would come to be another fair trial/free press issue in the case. The move to Denver also meant dozens of news organizations would soon send dozens of reporters to cover the proceedings. The expected press invasion of Denver raised more fair trial/free press issues that would impact management of the case. Meanwhile, the McVeigh Defense team was reaching out to the press again on the eve of the first anniversary of the bombing. McVeigh's media access also would raise fair trial/free press issues as the case progressed.

The day after Judge Matsch issued his change of venue order, federal lawmakers got involved in the closed-circuit broadcast debate.[269] Oklahoma Senators Don Nickles and Jim Inhofe along with Senate Judiciary Committee Chairman Orin Hatch sent a letter to Attorney General Janet Reno asking for her help in securing a closed-circuit broadcast. *The Oklahoman* published excerpts of the letter that read:

We understand and respect the court's decision in this matter, but recognize as well the hardship this change in venue will have on survivors and victims' families. We have been in touch with many of those affected by this tragedy and

> want to ensure that every option is pursued to afford each survivor and family member an opportunity to observe this trial.[270]

Attorney General Reno addressed this issue at her next weekly news conference. Ms. Reno said the Justice Department was considering assisting the victims:

> We are exploring all possibilities because I think it is so very important … that victims and survivors of victims have the chance to watch the process in action … We're looking at the law. We're looking at the court rules. We're looking at everything we can possibly do.[271]

Both defense teams and Judge Matsch said they did not want cameras in the courtroom even in the context of a closed-circuit broadcast.[272] Stephen Jones said any attempt to broadcast the trial would result in a "media circus."[273] Prosecutors stopped short of publicly endorsing the idea of a closed-circuit broadcast.[274] But privately, prosecutors asked Judge Matsch to remain open to the possibility.[275] The judge made his feelings clear to attorneys in a private meeting shortly after the change of venue order. Press reports about the meeting claimed Judge Matsch told both prosecutors and defense attorneys that federal court rules banned cameras of any type from federal criminal courts, and he saw nothing in the near future to change that.[276] The judge had earlier expressed the same opinion to reporters. The reporters caught up to Judge Matsch at Will Rogers World Airport in Oklahoma City while he was traveling for hearings in the case in late February 1996. When asked by reporters if he thought there would be any chance of getting cameras into his courtroom, he replied, "No, the rules do not allow cameras in the courtroom."[277] Karen Howick told *The Oklahoman* she was not surprised by the judge's comments. Howick told the newspaper:

> He's going to shift the burden over to Congress to make it allowable, and I think then Congress will act very quickly … I think that gives us a clear indication of what he wants us to do – which is change the law and he'll do it … I think Congress will make a special exception.[278]

In early March 1996, Congress did take action. It was the beginning of legislative actions that would result in the Oklahoma City bombing trials becoming the first federal criminal trials with any type of live camera presence. In March 1996, Oklahoma Representative Frank Lucas approached Illinois Representative Henry Hyde about adding closed-circuit provision to Hyde's Effective Death Penalty and Public Safety Act of 1996 – what would become the Antiterrorism and Effective Death Penalty Act of 1996. Lucas did not approach Hyde alone. *The Oklahoman* reported Representatives Hyde and Lucas held a news conference in early March about plans for the legislation, and they were joined by nearly twenty bombing survivors and victims.[279] On March 13, 1996, Mr. Hyde introduced the first draft of closed-circuit legislation known as Section 808 Closed Circuit Televised Court Proceedings for Victims of Crime as part of his Effective Death Penalty and Public Safety bill.[280] The Congressional Record entry for introduction of the measure read:

> (a) In General.--Notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary, in order to permit victims of crime to watch criminal trial proceedings in cases where the venue of the trial is changed – (1) out of the state in which the case was initially brought; and (2) more than 350 miles from the location in which those proceedings originally would have taken place; the courts involved shall, if donations under subsection (b) will defray the entire

cost of doing so, order closed circuit televising of the proceedings to that location, for viewing by such persons the courts determine have a compelling interest in doing so and are otherwise unable to do so by reason of the inconvenience and expense caused by the change of venue.

(b) No Rebroadcast. – No rebroadcast of the proceedings shall be made.

(c) Limited Access. –

(1) Generally. – No other person, other than official court and security personnel, or other persons specifically designated by the courts, shall be permitted to view the closed televising of the proceedings.

(2) Exception. – The courts shall not designate a person under paragraph (1) if the presiding judge at the trial determines that testimony by that person would be materially affected if that person heard other testimony at the trial.

(d) Donations. – The Administrative Office of the United States Courts may accept donations to enable the courts to carry out subsection (a). No appropriated money shall be used to carry out such subsection.

(e) Definition. – As used in this section, the term ``State'' includes the District of Columbia and any other possession or territory of the United States.[281]

Oklahoma Representative Ernest Istook spoke on the house floor immediately after the reading of the closed-circuit language. Mr. Istook praised the measure, and he made specific mention that the legislation was designed for victims – not for the press. Mr. Istook said:

> The language has safeguards. The proceedings are not to be rebroadcast elsewhere. They are not available for Court TV or CNN or anyone else …

because we want to minimize the disruptive effect that some might fear would otherwise occur.[282]

As support for the house bill was growing on Capitol Hill, support from the Justice Department was waning. The day before the reading of the house measure, the Justice Department announced it would not go any further in researching or supporting a closed-circuit viewing option for the bombing trial.[283] Prosecutors were concerned that if they became involved in advocating for closed-circuit broadcasts, while at the same time being responsible for prosecuting the case, it could be grounds for overturning a conviction on appeal.[284] Meanwhile, Judge Matsch and the Judicial Conference of the United States both made statements suggesting they might at least consider the closed-circuit possibility should Congress move forward with the measure. Judge Matsch said he would consider a closed-circuit request provided it came in the form of a motion from either prosecutors or defense attorneys.[285] Also in the same week, the Judicial Conference of the United States – the rule-making body of the federal courts – sent word to Congress that it should allow federal funds to be used to pay for any type of proposed closed-circuit trial broadcast. The Judicial Conference did not endorse the legislation, but the justices said it might be appropriate for the Oklahoma City bombing trial. The Judicial Conference justices said that if the legislation were limited in scope and provided discretion for judges, they did not fear it would set a precedent that conflicted with the Rule 53 broadcasting ban. However, the Judicial Conference stopped short of endorsing the legislation.[286]

The House measure passed on March 14, 1996 and went to a conference committee to be reconciled with legislation from the Senate, which also addressed

terrorism and federal death penalty statutes.[287] The measure returned to the House as Senate Bill 735, Antiterrorism and Effective Death Penalty Act of 1996. The closed-circuit provisions of the bill, Section 235, read:

> (a) In General --Notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary, in order to permit victims of crime to watch criminal trial proceedings in cases where the venue of the trial is changed--
>
> (1) out of the State in which the case was initially brought; and
>
> (2) more than 350 miles from the location in which those proceedings originally would have taken place; the trial court shall order closed circuit televising of the proceedings to that location, for viewing by such persons the court determines have a compelling interest in doing so and are otherwise unable to do so by reason of the inconvenience and expense caused by the change of venue.
>
> (b) Limited Access.--
>
> (1) Generally.--No other person, other than official court and security personnel, or other persons specifically designated by the court, shall be permitted to view the closed circuit televising of the proceedings.
>
> (2) Exception.--The court shall not designate a person under paragraph (1) if the presiding judge at the trial determines that testimony by that person would be materially affected if

that person heard other testimony at the trial.

(c) Restrictions.--

(1) The signal transmitted pursuant to subsection (a) shall be under the control of the court at all times and shall only be transmitted subject to the terms and conditions imposed by the court.

(2) No public broadcast or dissemination shall be made of the signal transmitted pursuant to subsection (a). In the event any tapes are produced in carrying out subsection (a), such tapes shall be the property of the court and kept under seal.

(3) Any violations of this subsection, or any rule or order made pursuant to this section, shall be punishable as contempt of court as described in section 402 of title 18, United States Code.

(d) Donations.--The Administrative Office of the United States Courts may accept donations to enable the courts to carry out subsection

(e) Construction.--

(1) Nothing in this section shall be construed--

(i) to create in favor of any person a cause of action against the United States or any officer or employees thereof, or

(ii) to provide any person with a defense in any action in which application of this section is made.

(f) Definition.--As used in this section, the term ``State'' means any State, the District of Columbia, or any possession or territory of the United States.

(g) Rules.--The Judicial Conference of the United States, pursuant to its rule making authority under section 331 of title 28, United States Code, may promulgate and issue rules, or amend existing rules, to effectuate the policy addressed by this section. Upon the implementation of such rules, this section shall cease to be effective.

(h) Effective Date.--This section shall only apply to cases filed after January 1, 1995.[288]

The bill came to a vote before the House on April 18, 1996 – the eve of the first anniversary of the Oklahoma City bombing. Prior to the vote, Representative Lucas spoke on the floor and said:

> [T]he measure provides for closed-circuit broadcasting of court proceedings in cases where a trial has been moved out of state more than 350 miles from the location in which the proceedings would have taken place. This provision is timely in light of the upcoming bombing trial. I believe all Americans who must endure such a tragedy, like the people of Oklahoma, deserve the opportunity to view the trial in their state. This measure provides the best way to ensure that those impacted by this tragedy will have access to the court proceedings of those accused in this case.[289]

The Antiterrorism Act passed in the house on April 19, 1996 – the first anniversary of the Oklahoma City bombing.[290] President Bill Clinton signed the act on April 24, 1996.[291] Several bombing victims attended the White House signing ceremony where the President Clinton said, "This bill recognizes that victims have a compelling interest in the trials of those accused of committing crimes against them and requires closed-circuit television coverage when federal trials are moved far away."[292] The victims had the law they wanted, but, despite some favorable signs from Judge Matsch and the Judicial Conference, there was no guarantee the court would consent to the closed-circuit provisions in the law.

While Congress was drafting and debating the legislation that would bring cameras into the bombing case, McVeigh was making on-camera appearances of his own. Stephen Jones began arranging meetings between McVeigh and journalists with the *Newsweek* story in June 1995, and as the first anniversary of the bombing approached, Jones stepped up his efforts.

McVeigh talked to reporters from the magazine *Media Bypass* in February 1996, and he talked to reporters from *Time* and the *Times of London* for articles that were published near the first anniversary of the bombing in April 1996.[293] Jones also arranged for NBC's Tom Brokaw and CBS's Scott Pelley to videotape meetings with McVeigh that were broadcast on the respective networks' nightly news programs on April 18, 1996.[294] The networks agreed not to show McVeigh in handcuffs and not to ask him questions about the facts of the case in exchange for the opportunity to obtain a short clip with both audio and video of McVeigh.[295] Scott Pelley told the *Denver Post* that the highly-structured meeting with McVeigh was "…one of the most frustrating

experiences of my life, sitting across from McVeigh, both of us with microphones on, the camera rolling and not being allowed to ask questions."[296] A spokeswoman for *NBC Nightly News* told the *Post* that Tom Brokaw's conversation with McVeigh was limited to questions about how he was being treated in prison and his health, but Brokaw was not allowed to ask any questions about the bombing case.[297]

Jones arranged other meetings between McVeigh and reporters in early 1996 that did not result in print articles or broadcast reports. Jones wrote that these meetings were arranged after the press organizations agreed to the stipulations that the meetings were:

> ... off-the-record, not for publication, not for attribution, that Mr. McVeigh could not discuss the facts of the case or his strategy, and that Mr. McVeigh would neither be tape recorded nor filmed, and no reference could even be made publicly to the fact that the reporter had met with Mr. McVeigh.[298]

Jones wrote that reporters and press organizations that had met with McVeigh under these stipulations included:

> The *Associated Press*, *The Dallas Morning News*, Channel 4, 5, and 9 in Oklahoma City, Jack Bowen for Fox Television [Oklahoma City affiliate], Barbara Walters, Diane Sawyer, Harry Smith of CBS Morning News, Dick Reavis, a well-known author, the *Washington Post*, the *Los Angeles Times* and the *Wall Street Journal*.[299]

Reflecting on these meetings, Jones described them as mutually beneficial for the press and the defense. Jones explained the meetings were opportunities for the McVeigh team to explore future options for getting their message before the public:

> There was a lot of interest in the press – reporters, newspaper, magazines, certainly television, [and] some radio – in interviewing Mr. McVeigh. From our standpoint, there was an interest in encouraging that, assuming that we had the right ground rules and assuming we had the cooperation of Mr. McVeigh. So, as kind of a test run, we let members of the media, which the court knew about, come in and interview Mr. McVeigh with the understanding that it was all off-record – they couldn't use any of it.[300]

In a *New York Times* article about Jones's dealings with McVeigh and the press during this period, Jones described the off-the-record meetings as "get acquainted" meetings for the reporters, while an unnamed print reporter called the hour long meetings "auditions."[301] Those assessments foreshadowed a detailed media access plan for McVeigh that would become a fair trial/free press issue before the court later in the year – a media access plan for Timothy McVeigh.

The press corps was engaged in planning of its own in early 1996 that would impact the court's management of the bombing case. Dozens of reporters were expected to descend on Denver when the first court proceedings began in April 1996.[302] Denver city officials expected that number to grow to hundreds once the case entered the trial stage.[303] Both the court and Denver city officials made it explicitly clear they did not want Denver to be plagued with the traffic and pedestrian congestion caused in downtown Los Angeles by reporters and newsgathering equipment outside the courthouse at the O.J. Simpson trial.[304] The solution was a media consortium designed to accommodate the needs of the press while working in concert with the City of Denver and the court.[305] The formation of the consortium was a direct result of Judge

Matsch's decision to move the trial to Denver, and it was evidence of how the change of venue order affected the court's management of the case.

The consortium, known as the Oklahoma City Bombing Trial Media Consortium, was an umbrella organization covering two other press groups – one for print media and the other for broadcast media.[306] The print group took the title Colorado-Oklahoma Print Media Group.[307] Associated Press Denver Bureau Chief Joe McGowan served as chairman for the print group.[308] In court documents, the print group claimed to represent the "The Associated Press and daily and weekly newspapers that have requested credentials to cover the trial."[309] The broadcast group took the title Colorado-Oklahoma Trial Group.[310] NBC Bureau Chief Roger O'Neil served as chairman of the broadcast group.[311] In court documents, the broadcast group claimed to represent "national television networks, television stations in the Oklahoma City and Denver markets, national radio networks, [and] radio stations in the Denver and Oklahoma City markets."[312]

The two groups came together to form the consortium as a means of coordinating all press logistics for trial coverage. Consortium members hired network television producer Wayne Wicks to serve as their coordinator. Wicks had previous experience as a broadcast producer and logician for large-scale media events such as the 1993 Papal visit to Denver and the 1996 Summer Olympics in Atlanta, Georgia.[313] Wicks became the link between the press, the court, and the City of Denver. Collectively these entities worked together to make downtown Denver capable of accommodating large numbers of reporters without interrupting the operations of the court or business in the city's center.[314]

Everyone associated with the trial knew it would be a large-scale media event, bringing potentially hundreds of journalists to converge on the courthouse in Denver. In an attempt to establish and maintain order outside the courthouse, the court and the consortium developed systems and rules for the press corps. The consortium obtained the court's permission to construct a press-only area on the courthouse plaza. The fenced-off area became known as the "bullpen."[315] The bullpen area was ready for the first proceedings in Denver in April 1996. The area had risers for broadcast reporters to stand on while performing their live broadcasts. It also had a podium with a multiple-line audio distribution box so attorneys and other trial participants who wished to talk to the press could do so without being swarmed by reporters.[316] Rules established for consortium members warned reporters that following trial participants outside the bullpen could result in the loss of credentials.[317] Still, several scenes from Luft's documentary about press coverage of the trial show multiple instances of reporters and camera crews swarming around attorneys on sidewalks outside the bullpen.[318] Stephen Jones recalled regularly being surrounded by crowds of reporters.[319] Michael Tigar remembered similar situations outside the courthouse.[320] Even so, city officials would later call the bullpen a success in maintaining order around the courthouse.[321] Overall, Jones and Tigar also considered the efforts to maintain order in the press corps successful. "In and around the courthouse and the perimeter, security for us, I have no complaints. My impression was that all of that was handled very professionally," Jones said.[322] Michael Tigar said, "By and large, from our perspective, it worked. And I thought the media thought it was a fair way to do things too."[323]

The consortium helped coordinate a variety of other logistical matters including credentialing reporters, establishing parking areas for broadcast satellite trucks, and establishing a pressroom in an office building across the street from the courthouse.[324] Besides logistics, the consortium also coordinated legal actions on behalf of consortium members.[325] Denver attorney Thomas Kelley represented the respective trial groups and individual consortium members in most of the press motions brought before the court during the case.[326]

The consortium was a unique fair trial/free press aspect of the bombing case, and it was an example of how the move to Denver affected the court's management of the case. Press coverage of the consortium indicated that such detailed coordinated efforts to cover a trial had not been attempted prior to the Oklahoma City bombing case.[327] The court, the city, and the press all recognized the potential for conflict and chaos with a large number of journalists coming to cover the trial. Instead of meeting in the fair trial/free press arena as adversaries, the parties met as allies. Together they established policies, procedures, and lines of communication that would allow the press to report on the case, allow the court to manage the case, and allow the city to maintain order in downtown. The system worked well enough that city officials in Sacramento, California, would contact Denver city leaders for advice prior to the 1998 trial of bombing suspect Theodore Kaczynski, known as the "Unabomber."[328]

Pretrial Issues in Denver

Once the case was established in Denver, there were still multiple fair trial/free press issues to be resolved. These issues included press access to audiotapes and audio feeds, attorney statements to the press, McVeigh's access to the press, and the issue of

closed-circuit coverage of the trials. In many of the cases, such as the audio issues and the issue of attorney statements, the court had precedent to guide its decisions. However, the push for closed-circuit coverage was unprecedented. In making a decision on this issue, the court would have to chart its own legal path. How the court resolved these issues would affect several aspects of case management. It would affect how attorneys conducted themselves with the press. It would affect McVeigh's future access to the press. It would also affect how much access the press had to courtroom audio and whether or not closed-circuit broadcasts would relay courtroom proceedings back to Oklahoma City.

The first Oklahoma City bombing case event held in Denver occurred on Wednesday, April 3, 1996, and it addressed fair trial/free press issues. It was a meeting between Judge Matsch and 150 reporters during which the judge explained how he would accommodate press interests during proceedings.[329]

Judge Matsch said he would reserve thirty-seven seats in the courtroom for reporters from specific press organizations and five seats for sketch artists. The remainder of the seats would go to the public.[330] To accommodate reporters who would not get courtroom seats, Judge Matsch said he would establish a listening room in a nearby courtroom with a live audio feed.[331] Court Clerk James Manspeaker said the main courtroom could seat 130 people and the listening courtroom could seat an additional 130 people, bringing the total number of the gallery to 260.[332]

Judge Matsch also announced that he would allow the press to purchase audiotapes of each day's proceedings through the court clerk's office following each day in court.[333] The practice of taping court proceedings and making those tapes

publicly available for a fee was a practice Judge Matsch had used in his court for a decade before the bombing trial.[334] The recording of federal court proceedings and the public sale of those recordings were allowed under rules adopted by the Judicial Conference of the United States in 1984.[335]

Judge Matsch's policy was to release audiotape copies of the day's testimony after each day's court session ended. Each ninety-minute tape could be copied through the court clerk's office for a fee of fifteen dollars.[336] The first tapes of the bombing case were offered for sale following the first court appearance of McVeigh and Nichols in the Denver court on April 9, 1996. The press's use of the tapes almost immediately ignited a fair trial/free press controversy.[337]

At the April 9, 1996, proceedings, court staff made copies of courtroom recordings and sold them to press organizations in accordance with the court's policy. The controversy arose from the fact that some broadcast press organizations used portions of the actual recordings in news reports broadcast the next day, April 10, 1996.[338] This was apparently something the court had not anticipated but something that drew a strong reaction from the Nichols defense team. The Nichols team responded two weeks later with a motion to stop the sale of courtroom recordings.[339]

Between Friday, April 26, and Wednesday, May 1, 1996, fair trial/free press issues would occupy all of the court's attention. Terry Nichols's attorneys would ask the court to stop the sale of audiotapes and to reject a press request to extend the live audio feed outside the courthouse.[340] The Nichols team and the government would both ask Judge Matsch to impose a gag order in an effort to quell information leaks to the press. Also, the government would approach the court with the long-anticipated request to

provide closed-circuit broadcasts of the trial in compliance with the Antiterrorism Act.[341] The case had just begun in Judge Matsch's own courthouse, and just like his first hearings in Oklahoma City, the focus would be on fair trial/free press issues.

On April 26, Terry Nichols's attorneys filed a motion with the court detailing their complaints about the broadcast of the audiotapes and asking the court to stop distribution of the tapes. The motion to stop the sale of audiotapes included an affidavit from Reid Neureiter, one of Nichols's attorneys. Neureiter wrote that he flew back to Washington, D.C. on April 9, 1996, following the first hearings in Denver. The next day he claimed he heard several news reports on the radio and saw reports on television that included audio excerpts of "the actual spoken words of counsel as delivered in the Court."[342] According to Neureiter, three of these reports included the voice of prosecutor Beth Wilkinson saying, "[The government] has no information showing anyone but Mr. Nichols and Mr. McVeigh were the masterminds of this bombing."[343]

Nichols's attorneys called the broadcasting of Wilkinson's statement "prejudicial and inflammatory."[344] The motion acknowledged that federal rules did allow for the recording of courtroom proceedings and the sale of the tapes, but the motion pointed out that other federal courts in Alabama, Alaska, Arizona, Arkansas, California, Maryland, Missouri, and Ohio had included provisions in their local court rules that barred broadcasting of the tapes. Nichols's attorneys claimed that without such rules in place for the District of Colorado, it was likely more broadcasting of the tapes would occur. The motion read:

> Unlike the standard case, it is a certainty that the press, given the opportunity, will edit and broadcast select portions of the proceedings. The notoriety of the

> allegations ensures that particularly inflammatory statements will be played over and over again. The practice of distributing tapes, while perhaps appropriate for a standard civil case, which is of interest only to the parties involved, should not be continued in this case.[345]

The Nichols team claimed broadcasts of the tapes violated Rule 53, the federal prohibition of broadcasting federal criminal court proceedings. The motion also claimed tapes could have detrimental effects inside and outside the courtroom.[346] Nichols's attorneys alleged that if attorneys and witnesses knew their words would be broadcast to a national audience, it could affect their courtroom conduct. Specifically, the motion referenced the O.J. Simpson trial that had concluded just six-months earlier in which, "Lawyers and witnesses, and perhaps the judge and jury, played to the microphones and the nationwide audience rather than conducting the task at hand."[347] Nichols's attorneys looked to precedent and wrote that concerns about trials becoming theater due to the broadcasting of proceedings were a major component in the *Estes v. Texas* Supreme Court decision. In that case, the Supreme Court overturned a conviction, saying the presence of broadcasting equipment in the courtroom disrupted the trial process, denying the defendant his right to a fair trial and his right to due process.[348]

Nichols's attorneys argued that broadcasting recordings of courtroom proceedings could also threaten the process of selecting an impartial jury. The attorneys wrote, "The court must assume that repetitive broadcasts of inflammatory statements made by counsel, frequently taken out of context, and edited for maximum tabloid television impact, will be heard time and time again by members of the prospective jury pool."[349] Again turning to precedent, the motion acknowledged that the Supreme

Court's *Chandler v. Florida* decision determined that broadcasting trials was not unconstitutional, but the Court also said judges should exercise caution so that broadcasting did not taint the process, especially in high-profile cases.[350]

Finally, Nichols's attorneys claimed that the press could not show a legitimate need for access to the tapes. Members of the press had access to both the main courtroom and the auxiliary listening courtroom, plus they had access to written transcripts that the court clerk made available to them on a daily basis.[351] The motion claimed that the press had multiple means of observing courtroom proceedings and checking notes against the court record. Without showing a need met only through access to the audiotapes, Nichols's attorneys argued that the press should not be allowed to purchase the tapes any longer.[352]

The McVeigh team did not object to the sale of audiotapes initially, but when the issue came before the court for a hearing on May 1, 1996, they joined the Nichols team in seeking to have the sale of the tapes stopped.[353] Like Nichols's attorneys, McVeigh's attorneys claimed the sale of the tapes violated Rule 53, since it was the functional equivalent of broadcasting courtroom proceedings. McVeigh's attorneys also expressed concerns that broadcasts of the tapes could infringe on McVeigh's right to a fair trial.[354] In retrospect, Stephen Jones said that he believed the court did not anticipate that the press would use actual audio from the tapes in broadcasts. "Judge Matsch is a very private individual, and I don't think that he saw the ramifications of what he was doing. Once he did, it very quickly came to his attention and then he acted to stop it," Jones said.[355]

The government also objected to the sale of the audiotapes.[356] Like the defense teams, prosecutors claimed selling the tapes was the equivalent of broadcasting, and that was a violation of Rule 53. Prosecutors said they feared the tapes could influence witnesses who might alter their testimony, knowing that their statements would be broadcast. Prosecutors also said the broadcast of witness testimony could taint the testimony of other witnesses who heard broadcasts before they had an opportunity to testify themselves.[357]

Press attorneys entered the fray next with a brief asking the court to continue the sale of audiotapes. Consortium attorney Thomas Kelley claimed the defendants had not produced any evidence showing the sale of audiotapes had implicated their rights to a fair trial.[358] In his motion, Kelley attempted to draw a parallel between broadcast and print media in arguing for continued sale of the tapes. *The Oklahoman* quoted from Kelley's motion:

> Defendants' conjectural concerns about "soundbyte" reporting cannot, at this stage, stand in the way of the First Amendment right of the press, and public to access information … there has been no showing that the media's selection of "soundbytes" will affect the venue any different than its selection of "wordbytes."[359]

The press had perhaps anticipated the Nichols team's motion and sought a preemptive measure. On April 17, 1996, press attorneys petitioned the court to extend the live audio feed to a pressroom established by the consortium across the street from the courthouse.[360] Press attorneys wrote that a feed to the pressroom would save the court clerk's office additional work created by having to make multiple copies of tapes

on a daily basis. The motion included an offer to make all journalists working in the pressroom agree that neither the live feed nor any recordings made from it would be broadcast.[361] To give further control to the court, the motion suggested that the court construct the audio system so that Judge Matsch could turn the feed on and off, thereby giving the court the ability to stop the feed if the judge felt the need to do so during proceedings. With access to the feed in the pressroom, the press attorneys claimed there would be fewer reporters going through security, fewer reporters going in and out of the courtrooms, and fewer reporters taking up seats in the auxiliary courtroom. The motion claimed that courtroom audio gave a more accurate reflection of what actually happened in the courtroom compared to the written transcript by allowing reporters to hear the emotion and tone in the voices of trial participants. In this respect, the press attorneys argued the live audio feed would help the press fulfill its role of providing accurate reports to the public. Press attorneys asked the court to establish the feed to the pressroom or to continue the process of offering audiotapes for sale.[362]

Terry Nichols's attorneys objected to the suggestion of sending a live audio feed to the pressroom. Nichols's attorneys claimed the live feed, like the audiotapes, would be the same as broadcasting the proceedings, and it too would be a violation of Rule 53. Furthermore, the Nichols team claimed that asking Judge Matsch to be responsible for turning the feed on and off would place an undue burden on the court, and it would be an unnecessary distraction in the courtroom.[363] Neither the McVeigh team nor the government objected to the pressroom feed, with the provision that the press would agree not to broadcast the feed or any tapes made from the feed.[364]

The first court actions in Denver had unexpectedly produced a fair trial/free press controversy. The court had apparently not anticipated that some members of the press would use the sale of audiotapes as an opportunity to broadcast those tapes. When that happened, the defendants and the government viewed the action as a violation of Rule 53's prohibition of broadcasting federal criminal trials. On top of that, the press was asking to extend the audio feed outside the courthouse. Judge Matsch faced a fair trial/free press decision about what to do with audiotapes and audio feeds, and his decision would have an impact on the future management of the trial.

While the court was considering the future of audiotapes and audio feeds, another fair trial/free press issue with a long history finally came to a head – information leaks and attorney statements to the press. The controversy would lead to calls for a gag order in the case. Judge Matsch held *in camera* (private) meetings with prosecutors and defense attorneys about the problem of information leaks on April 30 and May 1, 1996.[365]

From the beginning of the case, all parties had concerns about information leaks. It was a particular concern of the defense teams.[366] They feared news stories generated by the leaked information would result in prejudicial pretrial publicity.[367] On multiple occasions, attorneys complained about reading or hearing press reports that included sensitive information, usually attributing that information to unnamed sources.[368] Defense attorneys complained that news reports based on leaks placed them in a tenuous position. They had to choose between responding to the reports or staying silent.[369] Responding to the reports meant they might violate local court rules and professional ethics rules and risk running afoul of the court. However, not responding to

the reports meant the objectionable information would circulate publicly without challenge.[370]

The defense teams generally took different approaches. Stephen Jones often talked to reporters and defended McVeigh's interests in stories based on leaks.[371] Michael Tigar, however, most often gave no interviews regarding stories based on leaks.[372] Talking to the press was one of the first issues Judge Matsch addressed when he met with attorneys privately soon after taking over the case. The judge had admonished all parties to be extremely careful about their public statements.[373]

Even with the judge's admonition, both the prosecution and the defense accused each other of leaking discovery information to the press.[374] Discovery is a pretrial process in which the prosecution and the defense exchange information regarding evidence and witnesses they plan to use at the trial. Discovery is intended to allow prosecutors and defense attorneys the opportunity to prepare their respective case, and the process is a preventative measure to keep either side from being surprised by a piece of evidence or a witness once the trial begins.[375] There is no requirement to file pretrial discovery documents with court, and they are thus not public records.[376]

In August 1995, Judge Wayne Alley issued a protective order specifying that prosecutors and defense attorneys were not to release any discovery documents to anyone other than attorneys working the case and agents working for those attorneys.[377] The order only allowed for limited disclosure of discovery documents at hearings, or in motions to the court, and in the event attorneys needed to disclose information to witnesses while interviewing them.[378] Discovery documents associated with motions were also allowed to be sealed under Judge Matsch's procedures for sealed documents

established in January 1996.[379] Despite these orders, the parties continued to accuse each other of leaking information. The situation reached a critical point in April 1996 when Michael Tigar asked Judge Matsch to step in and investigate the problem.[380]

Tigar told the court that on the eve of the first anniversary of the bombing, he received a phone call from a network television producer asking for information about evidence involving Terry Nichols's alleged use of a long distance calling card.[381] Tigar said the producer claimed the information about the evidence had come from the government. Tigar also said his staff had learned that *The Dallas Morning News* and *New York Times* also had the phone record evidence along with F.B.I. reports that should not have been released to reporters or the public.[382] The Nichols team claimed leaks had been a persistent problem, but press reports based on leaked information had increased significantly during the week preceding the first anniversary of the bombing in April 1996.[383] On April 26, 1996, Tigar asked the judge to conduct an investigation of the leaks and to impose a gag order as a preventative measure.[384]

On April 30, 1996, the government made its own plea for a gag order, and the government also accused McVeigh's lead counsel, Stephen Jones, of courting media attention and leaking information to the press.[385] Lead prosecutor Joseph Hartzler told the court that Jones's appearances in the press posed a threat to a fair trial. "The blitz of interviews that Mr. Jones has conducted with national and local news programs, national weekly magazines and national and local newspapers has helped create publicity," Hartzler said.[386] Hartzler also said he had talked to an Oklahoma City reporter, who claimed to have received discovery materials that did not come from the government. Though Hartzler did not say where the Oklahoma City reporter got the

information, the implication was that it came from one of the defense teams.[387] Addressing the issue in general terms, Hartzler told the court, "After discovery materials are produced to the defense, selected portions of the materials become the subject of broadcast or print news stories," implying again that the defense might be to blame for the leaks.[388] Hartzler, however, agreed with Tigar that Judge Matsch should investigate the source of the leaks.[389]

The McVeigh team was equally frustrated by press reports based on leaks. Stephen Jones had characterized the government as a "Niagara Falls" of leaks since he first took over as McVeigh's chief counsel in May 1995.[390] Still, Jones expressed little confidence that a court investigation would solve the problem. Jones told the court, "[A] witch hunt for the source of the leaks in this case would be fruitless and would divert all parties from their principal responsibility – preparing for the trial."[391] Unlike the other parties, Jones objected to the April 1996 requests for a gag order. Jones said such an order would be difficult to enforce, especially against the government. He pointed out that the government's investigation and prosecution of the case placed a vast number of people in positions to have access to information. This meant leaked information could come from any number of human sources, and tracking down which ones might have leaked that information would be impractical. In comparison, the defense teams were small, and information passed through fewer hands. Jones's point was that a gag order would be a tool most likely to muzzle the defense, less so than the prosecution.[392] Jones defended his appearances in the press, saying it was his duty to defend McVeigh against the prevailing public perception that McVeigh was guilty.[393] As for Hartzler's

suggestion that the defense was leaking information, Jones said it was illogical to suggest the defense teams would leak information that would hurt their clients.[394]

Judge Matsch faced two decisions related to information leaks and their fair trial/free press implications. He would have to decide whether to conduct an investigation to find the source of the leaks. He would also have to decide whether a gag order was the best means of dealing with leaks for the remainder of the case. An investigation of leaks would take time and resources away from court and potentially delay bringing the case to trial. Imposing a gag order could lead to objections from the press and the McVeigh team, further frustrating the court's progress.

Amidst the swirl of fair trial/free press issues surrounding the court in late April and early May 1996 – audiotapes, audio feeds, leaks, and gag order requests – the government approached the court on May 1, 1996 with its request for closed-circuit broadcasts of the trial.[395] In the motion, prosecutors asked the court to allow a closed-circuit broadcast for victims, and they also offered suggestions for how to implement such a broadcast. The government claimed that allowing the broadcast would conform to the new antiterrorism law without setting a dangerous precedent to existing court rules barring cameras. Also, the government argued the broadcasts could be done without violating the defendants' Sixth Amendment right to a fair trial.[396]

In the motion, prosecutors first dealt with Rule 53, the federal court prohibition of cameras and broadcasting from federal courtrooms. Prosecutors claimed Section 235 of the Antiterrorism Act was designed to override Rule 53 in special cases, and the Oklahoma City bombing trial was a special case. The motion pointed out that the Denver court's own local rules allowed court employees to use recording devices and

cameras in the courthouse when acting in their official duties. The motion drew a parallel between the local rule and Section 235, suggesting closed-circuit broadcasting was an "official duty" of the court.[397]

The government next argued that the intent of the law was to accommodate victims who had been inconvenienced by the change of venue. Here the government pointed out that the court had discretion in determining who could get in to view the closed-circuit broadcast wherever it might be held. Prosecutors suggested a process through which victims could apply for admission to the viewing site through the Victim Assistance Unit of the Western District of Oklahoma. At that time, the Victim Assistance Unit was already in regular contact with more than 1,000 people who had registered with the office as victims of the bombing.[398] By limiting the audience to bombing victims, prosecutors argued that one of the primary criticisms of cameras in the courts would be eliminated – the criticism that cameras encouraged attorneys and trial participants to play to an audience. Prosecutors wrote:

> The closed circuit broadcast will not vastly expand the trial audience; it will simply extend the courtroom to people who would have observed the trial in person had the venue not been changed. The incentives for the participants in the trial should not appreciably change as a result of such an extension.[399]

In implementing the closed-circuit provisions of Section 235, prosecutors argued that the court should have total control over the purchase of equipment, establishing a secure audio/video feed, and establishing the rules of viewing. Prosecutors suggested that the court should pay for all equipment and services associated with the closed-circuit broadcast. This, they argued, would prevent any outside supplier of equipment or

services from claiming a right of access to the broadcast. Prosecutors extended an offer from the Department of Justice to cover any costs that the court could not cover. Prosecutors claimed a one-way digital transmission line would cost approximately $1,500 per month, and cameras and television monitors for transmission and viewing would cost approximately $175,000. The motion also suggested establishing rules of conduct inside the viewing room that would be the same as rules of conduct for the courtroom, including supervision provided by U.S. Marshals and other court appointed personnel. To ensure there would be no chance of a rebroadcast of the feed, prosecutors suggested the court prohibit any recording of the feed – only live, direct transmission to the viewing site.[400]

Finally, prosecutors addressed the issue of the defendants' rights to a fair trial. Prosecutors claimed Section 235 did not adversely affect the defendants' Sixth Amendment rights. The motion claimed the court would have total control over what cameras could show in the courtroom and remote viewers would not have any greater view of courtroom proceedings than those actually present in the Denver courtroom. Prosecutors wrote that the court could also extend the rule of witness sequestration to the viewing site, meaning witnesses could not attend the viewing if they were to be called to testify in the case. In conclusion, the motion read, "As long as the Court implements this statute in the very limited manner contemplated by Congress, the interests of the victims will be substantially furthered while the rights of the defendants remain unaffected."[401] In crafting the closed-circuit motion, the government had no direct precedent to look to as a guide since such a motion was unprecedented. With

respect to the interests of the victims, the government addressed those interests using the framework of existing victims' rights statutes.[402]

The next day, May 30, 1996, Terry Nichols's attorneys responded in opposition to the government's motion. The Nichols team offered three reasons for opposition. First, Nichols's attorneys claimed Section 235, by its definition, did not apply to the Oklahoma City bombing case. Second, they claimed the government had not made a showing for why it deemed Section 235 applicable to the case. Third, they claimed Section 235 violated "separation of powers and … denies due process and equal protection of the laws."[403]

In arguing that Section 235 was not applicable to the bombing case, the Nichols team pointed to the definitions of the words "venue" and "location" used in the language of Section 235.[404] The motion claimed that the wording of Section 235 showed the law applied in cases where a change of venue moved the case out of the state where charges were originally filed and at a distance of more than 350 miles from the location where the trial would have taken place. Nichols's attorneys argued that the District of Colorado consisted of the entire state of Colorado. This made the new venue the entire state of Colorado. They argued that either of the possible trial venues in Oklahoma, Oklahoma City or Lawton, was less than 300 miles from the Colorado state line, thus, by its own definition, the statue was not applicable to the bombing case.[405]

Nichols's attorneys again turned to the language of Section 235, claiming the government had not made a threshold showing for individuals with a "compelling interest" or for individuals who would be "unable [to attend the trial] by reason of the inconvenience and expense caused by the change of venue."[406] The attorneys argued

that the court should establish criteria for determining who had a compelling interest and/or suffered an inconvenience, and that the criteria should be subject to a hearing before the court. Nichols's attorneys also argued that had the trial taken place in Oklahoma City or Lawton, there still would have been victims unable to attend due to family commitments, work commitments, or limited courtroom seating, and such factors would not have been the result of a change of venue.[407]

The Nichols team's motion also claimed Section 235 violated the separation of powers doctrine. Nichols's attorneys wrote, "Congress cannot tell this Court – nor any Court – how to decide a specific issue in a pending case. An attempt to do so violates the most fundamental principles of separation of powers enshrined in the Constitution."[408] They claimed the intrusion was made more problematic due to the fact that the Department of Justice had advocated for passage of the law, while at the same time being in charge of prosecuting the case. Nichols's attorneys asserted that numerous prior cases had illustrated the dangers of broadcasting trials and concluded:

> In the face of such evidence, and at the urging of special interests, this case alone among all other federal cases is singled out, and this Court told to disregard the dangers. One defies the government to come up with another case to which the statute would apply.[409]

Nichols's attorneys expressed concerns about threats to due process and equal protection related to Section 235's provisions for witness exclusion. The law stated the court could bar a person from viewing if, "… the presiding judge … determines that testimony by that person would be materially affected if that person heard other testimony at the trial."[410] The Nichols team claimed that some victims might be allowed

to testify in the second stage if the trial resulted in a conviction, and such persons should not be allowed to view the trial in any fashion before being called to testify. The motion read:

> A defendant confronting victim impact testimony at trial should not have to face testimony that has been magnified or otherwise affected … by the trial. Witness testimony should be limited to reflect events, experiences, and emotions stemming from the crime, not emotions aroused by the extraneous additional stimulus of the televised trial.[411]

Finally, Nichols's attorneys claimed the presence of cameras and microphones in the courtroom would disrupt the trial. They claimed the court should not have to bear the additional burden and potential distractions of turning equipment on and off and deciding which persons and evidence the cameras should be focused on during the trial. Furthermore, they claimed the presence of the cameras would be a constant reminder for jurors that the victims of the crime were watching, and this could be prejudicial to the defendants.[412] Michael Tigar has since said that he was also concerned that trial participants would feel compelled to perform for the cameras. "I believe that when witnesses, and even some lawyers, know that when they're going to be or can be on national television, they behave differently. And they behave in ways that are inconsistent with the orderly search for truth," Tigar said.[413]

McVeigh's attorneys also objected to the government's request for closed-circuit broadcasts.[414] Like Nichols's attorneys, McVeigh's attorneys claimed Section 235 was an unconstitutional violation of the separation of powers doctrine. Furthermore, the attorneys claimed Section 235 violated McVeigh's Sixth Amendment

right to a fair trial and it denied McVeigh due process and equal protection required by the Fifth Amendment.[415]

McVeigh's attorneys claimed Section 235 allowed the legislative branch to usurp the judicial branch and its Rule 53 prohibition of cameras by imposing closed-circuit broadcasts on the court. McVeigh's attorneys wrote:

> Even if this Court decided that a closed-circuit broadcast of this trial would violate Mr. McVeigh's rights to due process and a fair trial, Section 235 leaves the Court powerless to protect those rights. It is for this reason that Section 235 unconstitutionally interferes with the Court's inherent authority under Article III of the United States Constitution to assure that the trial be conducted with fundamental fairness and within constitutional guidelines.[416]

McVeigh's attorneys next argued that the presence of the cameras would deny McVeigh his Sixth Amendment right to a fair trial by influencing several aspects of the trial. The attorneys claimed cameras would influence jurors by serving as a constant reminder that the victims were watching with specific expectations. Even if the cameras did not show jurors, the motion claimed the presence of cameras would suggest, "… a large, faceless group of grievously injured persons are depending on the jury to return the only verdict (guilty) and sentence (death) this group will find acceptable."[417]

McVeigh's attorneys argued the cameras would create a stressful and tension-filled environment for witnesses. The motion alleged this tension could have a negative impact on testimony by, "... caus[ing] the witness to become forgetful, evasive, cocky, distracted or even flagrantly dishonest."[418] The motion alleged cameras would put undue stress on the defendant as well. It claimed McVeigh would have to keep vigil

over his emotions for fear of how viewers might interpret his reactions and expressions. The motion read, "Mr. McVeigh will not be able to react, respond or speak with his attorney without the camera reporting his every nuance and gesture to untold legions of victims."[419]

The closed-circuit broadcast could also create a conflict of interest for the court, McVeigh's attorneys claimed. The lawyers wrote that prosecutors had argued for the broadcast, in part, as a means to aid in the recovery of the victims. McVeigh's attorneys claimed the court had no responsibility to assist in the victims' recovery. The McVeigh team posed the question, "How is a Court expected to assist actively in the victims' recovery while remaining absolutely fair to the person presumed by most of those victims to be guilty and deserving of death?"[420]

The broadcast might cause attorneys to alter their strategies, according to the McVeigh motion. McVeigh's lawyers feared victims watching in Oklahoma City would speak to the press about what they saw and heard, and this information could get back to jurors in Denver. The motion argued that this could taint the jury and put undue stress on attorneys.[421] McVeigh's attorneys also argued that there was no guarantee the signal would not be "pirated" and rebroadcast to a national audience.[422] If the court did allow taping of the proceedings, the McVeigh team said it was possible those tapes could be leaked.[423]

Finally, the McVeigh team claimed that the disruptions and distractions cameras could cause in the courtroom would deny McVeigh his Fifth Amendment right to due process of law. The motion read:

> Due process can flourish only if each trial participant properly performs his or her job. If courtroom cameras cause any of the trial participants to consciously or subconsciously alter their behavior or testimony, the camera has adversely impacted the proceedings and has denied Mr. McVeigh due process of law.[424]

McVeigh's attorneys concluded that the court's obligation to ensure a fair trial and due process for the defendant should override the victims' desires to observe the trial by closed-circuit broadcast, and he asked to court to strike down Section 235 as unconstitutional.[425]

The final days of April and the first days of May 1996 had provided the court with a plethora of fair trial/free press issues. Those issues were the future of audiotape distribution and a sound feed to the pressroom, calls for investigating information leaks and the imposition of a gag order, and the government's request to allow closed-circuit broadcasts of the trial. Judge Matsch would rule on them individually through the summer of 1996. His decisions would have effects on management of the trial including how journalists covered the trial, how attorneys conducted themselves with the press, and how victims would be allowed to view the trial.

On May 29, 1996, Judge Matsch issued his order on court provided audiotapes and the proposed live audio feed to the pressroom.[426] The judge had suspended the sale of audiotapes following the April 10, 1996, broadcast incidents, and with his May 29 order, he had decided not to renew the practice. Judge Matsch decided that the court would continue to record courtroom proceedings as a backup record for the written transcripts; however, he ordered the copy and sale of the tapes to stop. The judge wrote that the process of copying and selling the tapes had "resulted in the functional

equivalent of a broadcast of the court proceedings in violation of Rule 53."[427] The sale of audiotapes was over. The judge also denied the press motion to establish a live audio feed in the pressroom, but the issue would come up again later in the year.[428]

In his decision, the judge had employed precedent by looking to Rule 53. The rule specifically prohibited photography and broadcasting from the courtroom in federal criminal trials. While the tapes were not live broadcasts of the proceedings, the judge determined they were the "functional equivalent."[429] As such, the broadcasts of the recordings negatively affected the defendants' rights to a fair trial in the same fashion as live broadcasts, the judge wrote.[430]

On June 13, 1996, Judge Matsch issued his order on the request for an investigation of leaks and the requests for gag orders. He declined to conduct an investigation of the leaks for three primary reasons.[431] First, Judge Matsch claimed a thorough investigation was impractical. The number of documents involved and the number of people with access to those documents made it impossible to investigate every alleged leak. Second, he wrote that an investigation would likely require hearings, which would be open to the public. Since the hearings would focus on information that was supposed to be kept from the public, the judge determined the process would be counterproductive. Finally, he wrote that an investigation would take time and resources away from preparing for trial. This would not only slow the court down, but Judge Matsch claimed it could diminish public confidence in the court and the parties involved in the case.[432]

Judge Matsch addressed the issue with a restrictive order on extrajudicial statements. The order limited attorney comments, but it stopped short of a true gag

order.[433] The order offered specific guidelines for attorneys to follow when making public statements and when handling discovery information. The judge wrote, "... it is now necessary for the court to articulate the particular standards to be followed in this litigation in the form of this order for future guidance in all forms of extrajudicial statements about this litigation."[434]

Judge Matsch's order had seven major provisions based on precedent found in the American Bar Association's Model Rule and the bar/press guidelines. First, the order prohibited attorneys, and people working for them, from releasing information that could be published, "... if there is a reasonable likelihood that such disclosure will interfere with a fair trial of the pending charges or otherwise prejudice the due administration of justice."[435] Second, attorneys were required to "take reasonable precautions" to make sure their employees and others working for them did not disclose confidential information or release confidential documents.[436] Third, attorneys, their employees, and those working for them were prohibited from making extrajudicial statements regarding:

> (1) The prior criminal record ... or character or reputation of the defendants.
>
> (2) The existence or contents of any statements given by the defendants to law enforcement personnel or the refusal or failure of the defendants to make any statements to law enforcement personnel.
>
> (3) The performance of any examinations or tests or any defendants' refusal or failure to submit to any examination, or test.
>
> (4) The identity, testimony, or credibility of all prospective witnesses.
>
> (5) The possibility of a plea of guilty to the offenses charged or a lesser offense.

(6) Any opinion as to the guilt or innocence of the defendants or as to the merits of the case or the quality or quantity of evidence as to any charge in the case.[437]

Fourth, Judge Matsch wrote that the order did not prevent attorneys or their staff from announcing the court schedule, asking for help in collecting evidence, or "announcing without further comment that the defendants deny all charges made against them."[438] Fifth, the order prohibited attorneys and people under their supervision from making public statements or giving interviews in which they expressed their opinion about "the merits of the positions and arguments of any party or giving any predictions concerning the expected result [of the trial]."[439] Sixth, the order extended the provisions to all persons under the court's authority, including "court supporting personnel, including ... marshals, deputy marshals, court clerks, bailiffs, court reporters and employees or subcontractors retained by the court-appointed official reporters."[440] Seventh, the court asked attorneys to exercise caution when writing motions that included discovery information. The order also reiterated that motions containing discovery information should be filed under seal in accordance with the court's previous orders for filing sealed documents.[441] Attorneys and court personnel had not been prohibited from speaking about the case completely, but the order of June 13 clearly established the rules for comment, and Judge Matsch made it clear he expected everyone to follow his rules.

With his June 13 order on extrajudicial statements, Judge Matsch set the rules for all personnel under the court's authority regarding public statements about the case. He employed precedent in the order by using the American Bar Association's Model Rules and bar/press guidelines and tailoring them to meet the specifics of the bombing

case. The order did not prevent attorneys from speaking about the case, but it did provide a framework to help ensure such statements would not infringe on the defendants' rights to a fair trial or threaten the pretrial process. This order would stand until the beginning of Timothy McVeigh's trial.[442]

While the court was drafting the order for extrajudicial statements, the press was appealing Judge Matsch's ruling on audiotapes to the Tenth Circuit Court of Appeals. On July 9, 1996, the appellate court unanimously denied the appeal.[443] The opinion said Judge Matsch had "acted lawfully and within his discretion" when he decided to stop the sale of tapes.[444] The press did not appeal the judge's decision denying their request for an audio feed to the pressroom. That issue would come before the court again as the case neared trial. The issue of audiotapes, however, was decided. Judge Matsch had made his decision, and the decision would stand.[445]

Finally, on July 15, 1996, Judge Matsch made his decision on the closed-circuit broadcast at the close of a day-long hearing. Matsch determined that Section 235 was not unconstitutional.[446] He said cameras would be unobtrusive and the court would take measures to protect against any potential influence the cameras might have on jurors and to protect against any disruption of the proceedings.[447] Courtroom minutes of the hearing recorded the Judge's oral order:

> There will be no visible camera – panorama view by camera of the court not to include the jury. The influence on jurors will be a subject in *voir dire* of the jury. There are many controls that will be handled by the court. The trial judge will have an off switch within his reach.[448]

Judge Matsch said he would prefer to have a camera mounted to a wall, so as to make it as unobtrusive as possible. He said the camera would have a panoramic view of the courtroom, giving those at the remote viewing site a view of the courtroom similar to what spectators in the courtroom would see. The judge admitted there were still technical details to be worked out, and if it were not possible to have a secure transmission, the closed-circuit broadcast might not happen after all. Even so, the judge planned to move forward in compliance with Section 235 unless or until it proved impractical.[449]

In the closed-circuit decision, the court had no direct precedent to guide it. Judge Matsch would be the first federal judge to manage a federal criminal trial with closed-circuit broadcasting – a new and unique fair trial/free press issue. In August 1996, the press decided to explore this uncharted legal territory and approached the court with a request for access to the closed-circuit viewing.

The press petition for access to the closed-circuit broadcast came from a group of small Oklahoma newspapers and broadcast stations represented collectively as the Oklahoma Media Group. Members of the Oklahoma Media Group claimed that as small press organization, they were prohibited from covering the trial in Denver by limited budgets and small news staffs. As a remedy, these press organizations were petitioning the court for access to the closed-circuit broadcast.[450]

The Oklahoma Media Group tried to persuade the court that Section 235 had both extended the courtroom and created a new public space. The media group claimed the press and public should have access. First, the motion defined the viewing location as "…a technological enhancement of the courtroom."[451] From this "enhanced

courtroom" position, the media group argued that the presumption of openness of the courtroom established in *Richmond Newspapers v. Virginia* should apply. Furthermore, the media group argued that the government could not cite a compelling interest in closing the viewing as established by *Globe Newspapers v. Superior Court* and *Press-Enterprise I*.[452] But the media group followed this argument with the claim that "The closed-circuit broadcast in Oklahoma City is not merely a technological enlargement of the Denver courtroom, but a new and different public space where the American system of justice has center stage."[453] From this "public space" position, the media group argued that the press should have unfettered access. The motion quoted from *Craig v. Harney*, "A trial is a public event. What transpires in the courtroom is public property."[454] Finally, the media group suggested the court should move this "unique public space" out of the Western District Federal Courthouse and hold the viewing in a larger public setting that provided access to the press and the public.[455] The motion mentioned a then-recent court martial trial that had taken place at Tinker Air Force Base in Midwest City, Oklahoma, at which the press and public were allowed to watch a closed-circuit feed at a temporary auditorium set up in a warehouse. Media group attorneys claimed there were no court officials present, but decorum was maintained by military police who monitored the audience, and the judge in the actual courtroom had the ability to stop the broadcast when he deemed it necessary.[456]

Terry Nichols's attorneys responded to the Oklahoma Media Group petition on the grounds it misrepresented the intent of Section 235 and on the grounds that the press had ample access to the proceedings through their presence in the Denver courtroom.[457] Nichols argued that there was no question that the intent of Congress when drafting

Section 235 was to provide viewing access only to the victims of the bombing. The Nichols team also argued that the members of the Oklahoma Media Group could not draw an equivalent between their inconvenience and the inconvenience imposed on victims. The motion claimed that numerous press organizations regularly attended hearings in Denver and that often the Oklahoma journalists outnumbered the local Denver journalists. Finally, Nichols's attorneys called the assertion that denying the press access to the closed-circuit broadcast would violate the constitution "absurd."[458] The Nichols team argued that the constitutional rights of access asserted by the press applied only to the Denver courtroom. Also, Nichols's attorneys argued that the court had allowed for reserved media seating in the courtroom, ensuring press attendance at every open proceeding.[459]

McVeigh's attorneys responded to the Oklahoma Media Group petition, saying it was, "utterly unsupported by law or logic and should be denied."[460] Like the Nichols team, McVeigh's attorneys claimed that the intent of Section 235 was an accommodation for victims only and that no other group had been considered in the drafting of the legislation.[461] They also argued that the court had taken extraordinary measures to accommodate the press at the trial site in Denver. These accommodations included reserved seating that took up almost half of the gallery, a listening room in an adjacent courtroom, and a working pressroom in a building across the street from the courthouse.[462] McVeigh's attorneys called the media group's argument that smaller press organizations did not have the resources to attend the trial in Denver "specious."[463] Finally, McVeigh's attorneys objected to the media group's proposal for moving the viewing to a larger venue outside the courthouse. The motion read, "At the

worst, the media group's proposal invites anarchy. At best, the proposal contemplates a proceeding with all the solemnity and dignity of a University of Oklahoma Sooners home football game."[464] The McVeigh team concluded that the media group petition should be denied.

The government, likewise, objected to the media group petition.[465] Prosecutors, like the defense teams, maintained that Section 235 was written with the exclusive intent of accommodating victims. The prosecution motion disregarded the claim that the smaller press organizations lacked the ability to attend proceedings in Denver.[466] The government took the position that the closed-circuit viewing site would be an extension of the Denver courtroom, and if the press had access to the actual courtroom in Denver, that access alone was sufficient. The government concluded that the media group "had no statutory or constitutional right to attend the closed-circuit broadcast," and the government asked the court to deny the petition.[467] Judge Matsch would reserve his decision until January 1997.[468]

While the press was seeking access to the closed-circuit broadcast in August 1996, McVeigh was seeking access to the press. The June order restricting extrajudicial statements put a stop to McVeigh's meetings with the press. This presented a problem for Stephen Jones, who wanted to continue his efforts to improve McVeigh's public image. In August 1996, Stephen Jones approached the court with a plan he conceived and drafted himself, which he claimed would allow for more meetings between McVeigh and journalists, while working within the guidelines issued by the court.[469] In describing the intent of the plan, Jones said, "I wasn't trying to persuade anybody we were innocent. I was simply trying to neutralize what I thought was a very biased

picture of McVeigh as an individual."[470] Timothy McVeigh's media access proposal was the next fair trial/free press issue to come before the court.[471]

McVeigh's media access plan was a twenty-one-page motion that included a detailed plan for McVeigh to meet with a range of journalists from local Oklahoma City and Denver reporters, to national network broadcast correspondents, to the British Broadcasting Corporation. McVeigh's attorneys wrote, "If Mr. McVeigh is to receive a fair trial, one of the things that must be done is to present information that will begin to counter the false view that he is a demon."[472] The McVeigh team claimed the government and the press presented McVeigh as a dangerous, anti-social, anti-government zealot who was without a doubt guilty of the bombing. Also, the motion pointed out that in its change of venue order, the court had acknowledged the detrimental effects of press reports regarding McVeigh's background and character. What the McVeigh team wanted was a way to fight what defense attorneys viewed as prejudicial pretrial publicity. Following the June 1996 order setting forth guidelines for extrajudicial statements, the McVeigh team reasoned it should seek the court's approval for future contact between McVeigh and the press.[473]

The motion asked for approval to conduct a series of interviews with media organizations ranging from the British Broadcasting Corporation to Denver, Colorado, newspapers and television stations. It was the McVeigh team's plan that these interviews would result in:

1. A documentary to be shown to a British audience;

2. One national American television broadcast limited to no more than 30 minutes commercial air time …;

3. One print interview in Denver;

4. One national print interview with a newspaper;

5. One national print interview with a wire service;

6. One Oklahoma print interview;

7. One 15 minute Oklahoma City television interview (with the understanding that the interview could not be shown in Denver); and

8. One Denver, Colorado, television interview of 15 minutes.[474]

Jones wrote that the BBC had approached him about its desire to produce a documentary on the case soon after he took over as chief counsel. Jones claimed that the BBC had a long history of producing high quality, even-handed documentaries on controversial subjects. Jones told the court the BBC would agree to follow the court's guidelines on extrajudicial statements, and the BBC would agree not to release the documentary in America prior to the trial. Jones had asked the BBC to delay broadcasting any McVeigh documentary it might produce in the United Kingdom until after the trial, but the BBC would not make such a guarantee.[475]

As for United States media, the McVeigh team proposed letting McVeigh himself choose between one of several network television journalists to conduct a single half-hour nationally broadcast interview. Those to be considered included "Barbara Walters of ABC, Diane Sawyer of ABC, Susan Candiotti of CNN, Dan Rather of CBS, Tom Brokaw of NBC and Jack Bowen of Fox Television [Oklahoma City affiliate]."[476]

The McVeigh team sought national print coverage by proposing a single interview with "the *Boston Globe*, the *New York Times*, the *Wall Street Journal* or the *Los Angeles Times.*"[477]

For regional print coverage in the Southwest, the McVeigh team proposed an interview with one of the following newspapers: *The Dallas Morning News*, *The Oklahoma Gazette* or *The Tulsa World*. The motion suggested letting McVeigh himself choose between the Associated Press, Reuters, or United Press International for a single wire service interview. The defense also requested an interview with *The Rocky Mountain News* to cover the Denver print media market. *The Denver Post* was not considered because "it would not submit to an off-the-record pre-interview meeting."[478]

Local television coverage in the McVeigh plan asked for an interview with one television station in both the Denver and Oklahoma City television markets. Stations to be considered in Denver included KCNC (CBS), KMGH (ABC), and KUSA (NBC). Denver's Tribune Broadcasting independent station, KWGN, had told the McVeigh team it did not wish to participate. Oklahoma City television stations to be considered included KFOR (NBC), KOCO (ABC), KWTV (CBS), and Oklahoma Educational Television (PBS).[479]

The McVeigh team motion asserted a First Amendment right held by McVeigh to speak on his own behalf while awaiting trial. The motion cited precedent set by *Shepherd v. Maxwell* and *Irvin v. Dowd* in which the Supreme Court pointed out the dangers of prejudicial pretrial publicity. McVeigh's attorneys claimed they faced prejudicial pretrial publicity similar to the publicity referenced in *Shepherd* and *Irvin*. McVeigh's attorneys further suggested their best method of counteracting such publicity was to allow McVeigh to present himself to a national audience. The motion cited *Gentile v. State Bar of Nevada* in which the defendant's attorney went to the press and spoke publicly for the express purpose of combating what the attorney perceived to

be prejudicial press reports. Quoting from the *Gentile* decision, McVeigh's attorneys wrote:

> Far from an admission that he sought to 'materially prejudice an adjudicative proceeding', petitioner sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client's reputation in the community.[480]

The motion concluded:

> There is absolutely nothing that Timothy McVeigh can do or say in an interview which would prejudice the fairness of this criminal proceeding. He does not intend nor will he say anything about the facts of the case nor will he make statements which violate any of the [Colorado District] Court's directives concerning extrajudicial statements. What he might be able to do in some very limited sense would be to soften the less than human sculpture that the Government has chiseled into the consciousness of then nation. That would be completely consistent with Mr. McVeigh's First Amendment rights and the Government does not have the right to comment upon it.[481]

The government did comment on the plan on August 29, 1996 by stating its unequivocal opposition to McVeigh's media access plan. Prosecutors called the plan "An extraordinary attempt to manipulate the news media to produce a favorable impact on the potential jury pool."[482] Prosecutors claimed McVeigh's attempt to draw a parallel with *Gentile* relied on the minority opinion written by Justice Kennedy and joined by three other justices describing an attorney's professional obligations to defend the client against prejudicial publicity. Prosecutors, however, pointed to Justice Rehnquist's

majority opinion in *Gentile* in which Rehnquist wrote, "… trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."[483]

The change of venue was another fact the prosecution claimed should diminish the McVeigh team's argument. At the change of venue hearings, the defense teams had successfully argued that the amount of press coverage and the tone of press coverage outside of Oklahoma were different from coverage provided by the Oklahoma press. Prosecutors suggested that any action of the court to increase press attention given to the case prior to trial would be counterproductive, considering the purpose of moving the trial. Prosecutors concluded by writing that the best way to ensure a fair trial was to bring the case before a jury as soon as possible and not to encourage any more publicity in the interim.[484]

Nichols's attorneys objected to the McVeigh media plan on the grounds that it could have a detrimental impact on their management of the case. In August 1996, the court was still planning to try both defendants together. Nichols's attorneys argued that if tried jointly, the "relative culpability" of each defendant was something that jurors could consider.[485] This was particularly problematic for Nichols because the federal death penalty statute required jurors to consider the culpability of each defendant when deciding whether or not to impose a death sentence. Nichols's attorneys suggested a McVeigh press blitz could force them to take similar actions if McVeigh tried to implicate Nichols in the crime.[486] Nichols's attorneys also claimed that many of McVeigh's previous attempts at rehabilitating his image through the press had achieved just to opposite results. Nichols's attorneys wrote, "Hoist in part by his own media petard, Mr. McVeigh now seeks court approval for a bigger petard."[487] The Nichols

team's motion concluded similarly to the prosecution's motion, claiming that the remedy to pretrial publicity was to get to trial as soon as possible – preferably with separate trials for the two defendants.[488]

The McVeigh team responded to both the prosecution and the Nichols team in a reply brief. McVeigh's attorneys called the prosecution's response "… self-righteous hypocrisy which does not deserve the dignity of any detailed response."[489] The McVeigh response to the Nichols team's brief described it as "… a preview of its Motion for Severance which is to be filed next week and should be regarded as such."[490]

McVeigh's attorneys followed up on the original motion in September 1996 after a *Dateline NBC* television magazine episode broadcast information the McVeigh team deemed detrimental to its case.[491] The broadcast included interviews with two former federal prosecutors and a former FBI agent who expressed doubts that there were any unknown bombing suspects still outstanding.[492] McVeigh's attorneys claimed the report presented information that likely was funneled from the government to these former government employees in violation of the existing guidelines for extra judicial statements. The report did contain an on-camera statement from Stephen Jones, but Jones claimed that statement was recorded in January 1996, before the court's guidelines on extrajudicial statements were issued. McVeigh's attorneys wrote:

> Mr. McVeigh should not be required simply to sit back while the government continues to "produce" television programs which assume his guilt. He must be allowed, within the guidelines of this Court's order, to attempt to stop the perverse efforts of the prosecution to poison the prospective jury pool.[493]

In late September 1996, ABC, CBS, and NBC joined the fight for McVeigh's media access play by filing an *amici curiae* memorandum of law in support of McVeigh's motion. The press focused on the rules for press access to prisoners set by the Federal Bureau of Prisons and the First Amendment rights of both McVeigh and the press.[494]

The press claimed that nothing in the McVeigh team's interview plan would violate the six criteria set forth by the Bureau of Prisons for inmate interviews. Those criteria prohibited inmate interviews when: (1) The press organization declined to follow the bureau's rules; (2) The inmate is mentally or physically unable to take part in the interview; (3) The warden of the facility believes the interview poses a risk to the reporter, the inmate or safe operations of the prison facility; (4) The inmate is a juvenile; (5) The court has issued an order prohibiting interviews; (6) The inmate is in protective custody and the interview could threaten his/her safety by possibly revealing his/her location. The press recognized the guidelines for extrajudicial statements in place at the time, but the memorandum pointed out that the guidelines were directed at attorneys and court personnel, and they did not specifically address either of the defendants personally.[495]

The press memorandum offered rulings in two cases as support for its argument asserting a First Amendment right of the defendant. The first case, *United States v. Fort,* was a highly publicized federal prosecution in the Northern District of Illinois decided in 1987. In this case, four members of a Chicago street gang faced trial on domestic terrorism charges, and they sought access to the press prior to trial. The press memorandum claimed the Illinois court allowed the defendants to speak to the press,

citing the defendants' First Amendment rights of free speech and the absence of any evidence the interviews would threaten a fair trial.[496] The press memorandum also quoted a 1994 Ohio Court of Common Pleas decision, *Accord, Ohio v. Barker,* in which the court determined that before trial the defendant "'has the right to talk to whoever he pleases to talk to … The Court can't control that.'"[497]

Press attorneys asserted a First Amendment right for the public and the press to gather information for dissemination and to receive information. Press attorneys argued that *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* established the right to receive information and that *Branzburg v. Hayes* established a right for journalists to gather information.[498]

The press memorandum cited two cases that addressed restrictions on the First Amendment right of prisoners and did allow for the denial of interview requests in light of compelling state interests. The first case was *Saxbe v. Washington Post Co.*, decided by the Supreme Court in 1974. In this case, the Court ruled that wardens could bar prisoners from talking to reporters if access to members of the public was also barred.[499] In *Pell v. Procunier*, also decided in 1974, the Court determined wardens could prevent inmates from speaking with reporters if such actions would interfere with the goals of the mission of the penal system. These goals could include security and rehabilitation. However, the Court determined that unless such compelling state interests were implicated, the prisoner retained the First Amendment right of free speech.[500] The press attorneys concluded:

> None of those state interests is present here. Since McVeigh has not been convicted, the government has no interest in deterrence of rehabilitation that

might be adversely affected by granting the interview sought … Nor, unlike in Saxbe and Pell, does any law or regulation furthering any such state interests apply here. Just the opposite: the regulations applicable here, the Bureau's Media Access Rules – which were promulgated in 1979, five years after Saxbe and Pell – specifically authorize news media interviews of individual inmates, subject only to this Court's authorization.[501]

As to concerns that the interviews might impact either defendant's Sixth Amendment right to a fair trial, the press memorandum said such issues could be avoided. First, the press noted the Nichols team's pending motion for severance in which Nichols's attorneys were seeking to have their case severed from McVeigh's so each defendant could be tried individually. Were the motion granted, the press claimed any potential negative impact on Nichols would be mitigated. Second, the press claimed *Nebraska Press Assn. v. Stuart* held that pretrial publicity was not in and of itself detrimental to the goal of having a fair trial. Third, the press claimed successful prosecutions of high profile criminal cases such as the Watergate trials and the Abscam trials showed that thorough *voir dire* could produce impartial juries, even in cases that had generated extensive national pretrial publicity. Based on the case law offered in the memorandum and the argument made from those cases, the press asked the court to approve McVeigh's media plan.[502]

McVeigh's media access plan was a fair trial/free press issue created by another such issue – the order restricting extrajudicial statements. The press joined the McVeigh team in its attempt to continue contact with the press. The government and the Nichols team, however, claimed that giving McVeigh national and international press access

could taint the potential jury pool and that it contradicted the purpose in moving the trial to Denver – seating a fair jury who could give the defendants a fair trial.

The pending motions for severance led to another fair trial/free press concern in September 1996. Judge Matsch had allowed the severance motions to be filed under his earlier established procedures for sealed documents.[503] The documents in question were the severance motions submitted of both McVeigh's and Nichols's attorneys; Terry Nichols's statements made to the F.B.I. in April 1995 (entered as Exhibit 72); and the "Motion to Suppress Unlawfully Obtained Evidence" along with supporting exhibits submitted by Nichols's attorneys.[504] Judge Matsch did release documents related to the motions, but they were heavily redacted. The press wanted access to the documents in their entirety.[505] The press, led by *The Dallas Morning News*, filed objections with Judge Matsch, who denied those objections. In October 1996, *The Dallas Morning News* and a group of other press organizations appealed Judge Matsch's ruling to the Tenth Circuit Court of Appeals. The government joined the press in the appeal, citing a Department of Justice policy to oppose sealed documents unless unsealing those documents would threaten a person's right to a fair trial.[506] The appellate court would not hear the appeal until May 1997, and it would not issue a decision until July 1997.[507]

While the press was appealing the sealing and redaction of the severance motions, Judge Matsch was reaching a decision on the McVeigh team's media access proposal. Judge Matsch ruled on the McVeigh media plan with an oral order on October 4, 1996. The judge denied the plan in the interest of preserving the integrity of the proceedings.[508] In his oral order, Judge Matsch posed what appeared to be a rhetorical question: "Isn't this really putting on character evidence to the public as a whole in the

hopes of influencing the jury?"[509] The judge determined that anything McVeigh might say about his character would be evidence and that it would constitute evidence presented before the trial. For this reason, Judge Matsch denied the McVeigh team's motion for media access.[510] McVeigh's attorneys did not appeal Judge Matsch's order nor did they present another media access plan. In retrospect, Stephen Jones said questions about the media plan should not have focused on *if* McVeigh's appearances would influence the jury, rather those questions should have focused on *how* the media plan might influence jurors:

> I think it would be more accurate to say that, yes, we were trying to influence the jury perception that McVeigh did not have two horns and a pointed tail, which is not the same thing as saying he was not guilty because certainly very good people can commit crimes or people that are seemingly good. But what we were trying to say is, "Judge, we need at least a fifty-fifty chance in how the public understands our client."[511]

The denial of McVeigh's media access plan meant he would not have any further meetings with reporters prior to trial. Judge Matsch determined the integrity of the legal process was of paramount concern, and even interviews restricted to discussions of McVeigh's character and background could be prejudicial.

In December 1996, the press approached Judge Matsch again, asking him to reconsider extending the live audio feed serving the listening courtroom to the pressroom across the street from the courthouse. Roger O'Neil, chairman of the consortium's broadcast group, sent a letter to Judge Matsch asking him to reconsider his earlier decision denying the live audio feed to the pressroom.[512] O'Neil's letter restated

what the press saw as benefits of the live feed including fewer reporters taking seats in the auxiliary courtroom, fewer disruptions caused by reporters going through security checkpoints, and fewer reporters going in and out of the courtrooms.[513] O'Neil wrote that reporters could benefit from the feed by being able to hear testimony while at their workstations. This would allow them to have the latest information at deadline, and they would have more accurate information by being able to hear exactly what happened in the courtroom.[514] Finally, O'Neil assured the judge that the press would stipulate that no members of the press corps could record the feed or broadcast it live. All journalists in the courtroom would have to agree to use the feed for listening purposes only. O'Neil suggested that penalties for violating the rules against recording could include "...revocation of a reporter's press credentials to the pressroom and/or courtroom, revocation of the same to that reporter's news organization, fines, and even contempt."[515] O'Neil's letter included a two-page report compiled by print group member Lee Hancock of *The Dallas Morning News* listing other recent high-profile trials in which courts had allowed for live audio feeds to press work areas during the trial. The list of trials included the 1993 Rodney King civil rights trial, the 1993 Randy Weaver trial, and the 1994 Branch Davidian trial.[516] Judge Matsch agreed to consider the matter again and asked prosecutors and defense attorneys to respond.[517]

Nichols's attorneys responded by renewing their earlier objections. Nichols's attorneys also claimed that in the Rodney King case, some portions of testimony had been broadcast in violation of court rules. The Nichols team claimed the threat to a defendant's right to a fair trial should be the court's primary consideration. In the event a news organization did broadcast the feed, Nichols's attorneys claimed that his rights

would be violated and that taking punitive action against the offending journalist would not restore his rights.[518] The McVeigh team did not file a response.[519] The government did not take a position on the new proposal. Prosecutors said it was a matter within the court's discretion.[520]

On January 29, 1997, Judge Matsch agreed to the pressroom audio feed with the provision that the press would agree not to broadcast the feed in any manner.[521] The judge said any broadcast of the pressroom feed would result in termination of the feed for all reporters.[522] The audio feed to the pressroom would last through both the trial of Timothy McVeigh and the later trial of Terry Nichols without any violations of the court's rules for its use.[523]

The same day Judge Matsch announced his decision on the audio feed to the pressroom, he announced his decision on media access to the closed-circuit broadcast. Judge Matsch denied the Oklahoma Media Group's petition, saying Section 235 applied only to victims and did not allow for press access to the viewing site.[524] "Members of the media have no standing under the statute," Judge Matsch said.[525] He added that it was his desire to have the same rules and decorum in the closed-circuit viewing that he had in his courtroom.[526]

Also at the hearing, Judge Matsch announced that the viewing location would be established at Oklahoma City's Mike Monroney Aeronautical Center in the Federal Aviation Administration's auditorium.[527] Prior to this, the court had been considering the largest of the Western District Federal Courthouse in downtown Oklahoma City, which could seat approximately 145 people.[528] The F.A.A auditorium, however, was a "movie-style auditorium" that could seat 330 people.[529] The auditorium was also in a

fenced-off area adjacent to Oklahoma City's Will Rogers World Airport, which allowed court personnel greater ability to control access and provide a secure environment for victims.[530]

In January 1997, the court resolved two pending fair trial/free press issues – extension of the audio feed to the pressroom and press access to the closed-circuit viewing. The court allowed the audio feed to the pressroom with the understanding that members of the press would police themselves and not allow the feed to be recorded or broadcast. The court placed its trust in the journalists that there would not be another episode like the broadcasting of the audiotapes and it would be the responsibility of the journalists to preserve that trust. However, the press would not be allowed to view the closed-circuit feed. Judge Matsch determined that the language and intent of Section 235 only addressed victims of the bombing and that they would be the only audience for the broadcast.

The Press Threatens the Trial

Timothy McVeigh's trial was set to begin on March 31, 1997.[531] On February 14, 1997, the District Court of Colorado sent out summonses to 700 prospective jurors spread across twenty-three Colorado counties. It was the largest summons ever issued in the Colorado Federal District.[532] The summonses included a warning for prospective jurors to immediately avoid press coverage of the case and the defendants.[533] Judge Matsch's admonition would be tested two weeks later.

As the court was calling jurors to hear the case against McVeigh, the press would publish stories that threatened to derail the case. The issue of prejudicial pretrial publicity would come back before the court in the wake of several stories claiming

McVeigh admitted to taking part in the bombing. The McVeigh defense team would turn to precedent, citing other cases in which prejudicial pretrial publicity had denied defendants their rights to fair trials. Prosecutors would claim the case should go forward before more such stories came to light. The court would make a decision relying on judicial experience more than precedent. The result would be that the trial for Timothy McVeigh would go ahead as scheduled.

In his book *Others Unknown*, Stephen Jones recounted the events of February 27 and 28, 1997, which led up to a monumental episode in the trial of Timothy McVeigh.[534] Jones wrote that on the afternoon of Thursday, February 27, *Dallas Morning News* reporter Robert Hillsman came to Jones's Denver office for an interview. Jones claimed the interview seemed secondary to the real reason for the visit – Hillsman wanted to know if Jones would be available the next afternoon to talk to *Dallas Morning News* reporter Pete Slover about an article he was working on.[535] Jones wrote that the meeting with Hillsman raised his suspicions that the article Slover was preparing might be something important and possibly controversial.[536]

The following afternoon, February 28, 1997, Jones received the call he was expecting from Slover. Jones wrote that Slover informed him *The Dallas Morning News* was preparing a story based on legally obtained defense documents that showed Timothy McVeigh admitted to bombing the Alfred P. Murrah Federal Building.[537] Jones wrote that he immediately began making phone calls to *Dallas Morning News* management and the newspaper's attorneys trying to find out what information they were basing their article on and trying to stop publication of the story. When he realized

publication was imminent, Jones wrote that he notified the court in hopes of trying to get an injunction to stop or delay publication in the next day's paper.[538]

The Dallas Morning News did not wait for the next morning's edition. The paper published Slover's article on its Internet site on Friday afternoon following the rounds of telephone calls with Jones.[539] The article was also republished in the Saturday, March 1, 1997 print edition of *The Dallas Morning News*.[540] The confession story was also reprinted or extensively quoted in other newspapers on March 1, including *The Oklahoman*, *The Denver Post*, the *New York Times*, and *The Rocky Mountain News*.[541] Through the remainder of the weekend, the broadcast networks and cable networks picked up the story, blanketing the nation with news of McVeigh's alleged confession.[542]

The *Dallas Morning News* article claimed to be based on summaries of interviews McVeigh conducted with members of his defense team during his 1995 incarceration at the El Reno Federal Prison in El Reno, Oklahoma.[543] Slover wrote that the documents showed McVeigh never denied his role in the bombing; instead he gave details about the planning and execution as well as the motive for the bombing. Slover's article claimed McVeigh told the interviewers the bombing was carried out as a message to the United States government and that the bombing took place during business hours so that it would result in a high number of deaths.[544] One of the more dramatic quotes attributed to McVeigh in the article was his alleged response to the initial question about why the bombing was not carried out after business hours. McVeigh reportedly replied, "That would not have gotten the point across to the government. We needed a body count to make our point."[545] The article further claimed

McVeigh told the interviewers that Terry Nichols was involved in the planning of the bombing, but there was no John Doe number two, which had been the subject of much debate throughout the case. Slover wrote that McVeigh claimed he alone drove the Ryder truck carrying the bomb to the Murrah Building.[546]

Steven Jones called Judge Matsch for an emergency meeting at 5:00 p.m. on the afternoon of Friday, February 28. Judge Matsch called prosecutors, so they could join the meeting by phone, as Jones sought a way to respond. Jones asked the judge to set aside the order on extrajudicial statements temporarily so he could respond freely to the article, and the judge agreed.[547] Claiming to have no knowledge of what the documents were or where they came from, Jones told reporters at a press conference on the Denver courthouse steps Friday night that *The Dallas Morning News* may have been tricked with fake documents.[548] Jones called the publishing of the article irresponsible, and he accused *The Dallas Morning News* of engaging in sensational journalism.[549] Jones also suggested the newspaper may have obtained the documents illegally – a charge the attorney for the newspaper denied.[550]

Following the *Dallas Morning News* confession story, Stephen Jones conducted an internal investigation. He has written that the investigation revealed that the newspaper did receive internal defense documents through the actions of a McVeigh defense team member.[551] Jones claimed the staff member admitted to him that in January 1997 the staff member had taken a laptop computer from the office and attended a lunch meeting at an Oklahoma City restaurant with *Morning News* reporters Arnold Hamilton and Pete Slover. Jones's staff member said that following the meeting he and the two reporters went to the *Dallas Morning News* offices in Oklahoma City to

continue their conversation. The staff member told Jones that he received a cell phone call while at the newspaper office, and he walked out of the office to his car to speak in private. The man claimed that when he left the office, he left the laptop alone in the office with Pete Slover. When the staff member returned to the office, he claimed Slover got up and left immediately without saying anything. The staff member told Jones that Slover might have downloaded the files from the computer while he was out of the office.[552] Similar details of the encounter were offered in McVeigh's post conviction appeal.[553] Following the publication of the confession story, however, *The Dallas Morning News* claimed that the documents were legally obtained.[554] On Sunday, March 2, 1997, *Dallas Morning News* Executive Vice President and Editor Ralph Langer announced the newspaper would not publish any more articles based on the documents, saying future articles based on the information would not have the "overriding public significance" that the original article did. Langer said the documents would be turned over to the newspaper's attorney, who would keep them secure.[555] Stephen Jones did not ask the court to delay the trial or take any other action following the *Dallas Morning News* episode, but there was another confession story yet to come.

On March 11, 1997, another confession article appeared. Again, it was first published via the Internet, but this time on the homepage of *Playboy Magazine.* The author of this article, Ben Fenwick, also claimed to have legally obtained internal defense documents, which included a "sixty-page chronology prepared by the defense recounting McVeigh's story of how he had carried out the bombing."[556] Following the release of the article, Fenwick appeared on the ABC network's news magazine *Prime Time Live* on March 12, 1997 as well as the ABC, CBS, and NBC morning news

programs on March 13, 1997.[557] With two confession stories drawing national press attention and jury selection set to begin in slightly more than two weeks, Stephen Jones made an appeal to the court.[558]

On Friday, March 14, 1997, McVeigh's attorneys filed a motion asking the court to dismiss the charges, to delay the trial, or to grant another change of venue.[559] The motion claimed the intense press focus on *The Dallas Morning News* article and the *Playboy* article had spread reports of the alleged confession nationwide. The story had also been covered extensively in the Denver media market, and the attorneys argued that potential jurors had undoubtedly seen, heard, or read some of the reports. To support claims of widespread publicity in the Denver area, McVeigh's attorneys supplemented the motion with copies of fifty-two articles that ran in newspapers serving the Denver area and eighty-two transcripts of broadcast stories that aired on stations serving the Denver area reporting on the confession stories.[560] McVeigh's attorneys claimed that under such circumstances, it would be impossible to ensure a fair trial set to begin in seventeen days.[561]

In presenting their argument, McVeigh's attorneys looked to precedent, citing two cases that involved pretrial publicity and confessions that had both resulted in rulings favorable to the defendants. The two cases were the Supreme Court case *Rideau V. Louisiana* (1963) and the Eleventh Circuit Court of Appeals case known as *Coleman v. Kemp* (1985). The McVeigh motion claimed these cases had similarities with the situation before the court in the McVeigh case, and the precedents set in these cases showed the McVeigh court should take action to remedy the problems presented by prejudicial pretrial publicity.[562]

In *Rideau v. Louisiana*, the Supreme Court reversed the conviction of robbery and murder defendant Wilbert Rideau. Rideau had taken part in a bank robbery in which a bank employee was killed. He was arrested shortly after the crime, and the next day the Calcasieu Parish sheriff allowed a camera crew to film Rideau answering questions from the Sheriff at the jail. During the interview, Rideau did not have an attorney present, and he admitted to his role in the robbery and murder. The interview subsequently aired three separate times on local television stations. Based on the facts of the interview, Rideau's attorneys sought a change of venue, but they were denied. Rideau was tried, convicted, and sentenced to death. Three of the jurors in the case later admitted to having seen Rideau's statements on television.[563]

The Supreme Court determined that the most unusual circumstances in Rideau's case tainted the jury and denied him his right to a fair trial. The Court wrote:

> The record shows that such a thing as this never took place before in Calcasieu Parish, Louisiana. Whether it has occurred elsewhere, we do not know. But we do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised interview. "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death" [Quoting from *Chambers v. Florida*].[564]

McVeigh's attorneys argued that the situation presented by *The Dallas Morning News* story was far more prejudicial than that of Wilbert Rideau. The Rideau interview was

broadcast only three times to a localized audience, but the stories of McVeigh's alleged confession went to a much larger audience. The motion read:

> These reports have been relentlessly republicized by every media known to man. In sum, in this case, egregiously prejudicial and inflammatory pretrial publicity has saturated not only the Denver community where Mr. McVeigh's trial is to be held, it has swept the nation.[565]

Coleman v. Kemp was a Georgia case reversed by the Eleventh Circuit Court of Appeals in 1985.[566] The defendant, Wayne Coleman, and an accomplice were tried, convicted, and sentenced to death for murdering six members of a Donalsonville, Georgia, family. The case received extensive press coverage, and Coleman's attorneys highlighted the fact that coverage routinely included law enforcement statements claiming Coleman was guilty of the crime. Regarding this pretrial publicity, the appellate court wrote:

> All of the foregoing was widely reported in all of the newspapers serving Seminole County, and in what the record discloses of the broadcast media. It was repeated time and again. The details of the testimony of Coleman's own half-brother, Billy Issacs, describing explicitly the horrible manner in which Coleman and the others murdered the six Alday family members, were widely and repeatedly reported in Seminole County immediately prior to Coleman's trial. In short, there was an overwhelming showing in the press of petitioner Coleman's guilt before his trial ever began.[567]

McVeigh's attorneys drew a parallel between the pervasive pretrial publicity in *Coleman* and the publicity generated by the *Dallas Morning News* article. McVeigh's attorneys wrote:

> Here it is likewise inconceivable that Mr. McVeigh will receive an impartial assessment of his guilt or innocence based on the evidence adduced at trial. This court should heed the wisdom on the *Coleman* decision and avoid a travesty of justice.[568]

As a remedy for the situation, the McVeigh team proposed a continuance of the case, a change of venue or dismissal of the charges with prejudice – meaning the charges could not be filed again.[569] McVeigh's attorneys claimed moving forward with the case and attempting to screen out jurors who may have heard and been prejudiced by the news reports would be impractical. McVeigh's attorneys wrote, "Questioning these prospective jurors during *voir dire* regarding what they have heard about this case and having them repeat what they have heard only brings the prejudicial facts to the forefront again."[570] If the court would not dismiss the charges, McVeigh's attorneys asked for a delay of the trial for one year. If the court would not delay, McVeigh's attorneys asked for a change of venue to "... the Districts of Alaska, Hawaii, Puerto Rico, the Virgin Islands, [or] Vermont."[571]

The prosecution responded to McVeigh's motion the same day. Prosecutors rejected McVeigh's claim that some type of relief was required. Instead, prosecutors took the position that any damage done to the prospective jury pool could not possibly be known until *voir dire* began, thus the solution was to move forward with the trial as

soon as possible. Prosecutors wrote, "It is now the time to try the case in court rather than be held hostage to outside events that the Court cannot control."[572]

Prosecutors claimed that the McVeigh team's attempt to draw parallels with *Rideau* were specious. Prosecutors wrote that the Denver court had a much larger jury pool to draw from than the court in *Rideau*. Also, prosecutors claimed the Supreme Court had clarified since *Rideau* that publication of inadmissible and prejudicial evidence does not mean there is presumptive prejudice. Furthermore, prosecutors wrote that, unlike prosecutors in *Rideau*, the government "... has never lent credence to any notion that McVeigh confessed to the crime, and the reported details and circumstances of any communication between McVeigh and his defense team are murky at best."[573]

The prosecution suggested that extensive and vigorous *voir dire* was the proper way to deal with any prospective juror opinions that might have been influenced by the confession stories. In making their point on this matter, prosecutors cited *Stafford v. Saffle* – the appeal of Oklahoma mass murderer Roger Dale Stafford. Stafford's federal appellate attorney had been Stephen Jones.[574] Prosecutors wrote:

> In Stafford v. Saffle ... publicity in an Oklahoma state death penalty case permeated a small community to the extent that all 36 potential jurors had prior knowledge of Stafford, or the Lorenz and Sirloin Stockade murders, and of the inadmissible fact that Stafford already had received the death penalty for the Sirloin Stockade murders. The Tenth Circuit nonetheless held that Stafford had not shown "that an irrepressibly hostile attitude pervaded [the] community" and the voir dire sufficed to remove any actual bias.[575]

Prosecutors argued that the court had taken more than adequate steps to ensure an impartial jury and that getting the case before the jury sooner rather than later was the best course of action.[576]

On March 17, 1997, Judge Matsch ruled on the McVeigh team's motion. Judge Matsch denied the motion and ordered the case to proceed as scheduled. The judge wrote, "Past experience with jurors and a general awareness of public attitudes about pretrial publicity in criminal cases strongly suggests that these stories have had neither the wide exposure nor general acceptance that the defendant's lawyers presume."[577] Judge Matsch wrote that the confession stories were just the latest in a series of on-going publications about the case and participants in the case. He also wrote that the court had gone to great lengths to ensure "foundational fairness" in the case.[578] The judge claimed the court had afforded McVeigh foundational fairness throughout the proceedings and such would be the case in seating the jury. He wrote:

> The extensive *voir dire* to be conducted in this case will determine whether the persons summoned from 23 counties in Colorado include at least 18 people who can serve as jurors and alternates in the forthcoming trial. I have full confidence that a fair-minded jury can and will be impaneled and that those selected will return a just verdict based on the law and evidence presented to them.[579]

With that decision, the trial of Timothy McVeigh went forward as scheduled, but it would move forward under a new and much more restrictive order regarding out-of-court statements – a true gag order.[580]

Judge Matsch claimed the new order was needed because the case had moved into its most crucial phase – jury selection and trial. Whereas the earlier order offered

attorneys some latitude in their comments for the purposes of defending their clients in the press and soliciting help in collecting evidence, Judge Matsch claimed those attorney roles were not relevant in the jury selection and trial phase. The judge wrote:

> The media attention given to the jury selection proceedings will be satisfied by the reportage being provided by news organizations and commentary from those members of the legal profession willing to provide it. There is no need for the trial participants to explain any aspects of the open trial.[581]

The judge did not plan to sequester the jury, and he cited this fact as a main reason for toughening his stand on out-of-court statements. While prospective jurors had been warned in the summonses and would be warned when they appeared for *voir dire* not to read, watch, or listen to news about the case, Judge Matsch wanted to make sure that if any prospective jurors did inadvertently see, watch, or listen to a report, they would not be exposed to comments from an attorney or court official. The judge wrote:

> Any statements from the prosecutors, defense counsel, government officials and agents having official responsibilities relevant to this case, the defendant and court personnel may reasonably be expected to be perceived differently and carry a much greater threat of prejudice to fairness.[582]

Based on that concern, Judge Matsch issued his order prohibiting anyone involved with the case in an official capacity from making "any comments or statements outside the courtroom, concerning any of the evidence, court rulings and opinions regarding the trial proceedings and anything concerning the jury."[583]

The gag order faced a final challenge on the eve of opening statements in Timothy McVeigh's trial. On April 23, 1997, McVeigh's attorneys filed a motion

asking to set aside the April 16 gag order once the trial began. Press attorneys filed a companion petition also seeking to vacate the gag order. McVeigh's attorneys and press attorneys argued that once the jury was seated and testimony began, the specter of public comments affecting potential jurors vanished, and the gag order would no longer be needed.[584] On April 26, 1997, Judge Matsch held a hearing on the issue. The judge ruled that Nichols's attorneys could be excused from the April 16, 1997 gag order because Nichols's trial had not begun, but the Nichols team would still have to comply with the guidelines for extrajudicial statements established in the June 13, 1996 order. Judge Matsch reserved ruling as to McVeigh and the press, and he issued his written order on May 5, 1997.[585]

Judge Matsch denied the request from the McVeigh team and the press to set aside the gag order. The judge wrote that the beginning of testimony did not lessen the chance attorney comments could affect the jury, and concerns about jurors hearing extrajudicial statements were heightened by the fact that the jury was not sequestered. He wrote:

> All jurors have been instructed to avoid publicity about the case and they are given daily reminders of their obligation to decide solely on what they hear and see as evidence in the case. While the court has full confidence in these jurors and trusts them to follow these instructions, there is always the possibility that some headline or broadcast teaser will be seen or heard. The potential for prejudice from an inadvertent exposure to publicity can be greatly diminished by assurance that the news stories are not based on disclosures by counsel or those who are participating in the conduct of the trial of Timothy McVeigh.

> That assurance can only be provided by an order as clear and direct as that entered on April 16, 1997.[586]

Turning to the press, Judge Matsch wrote that the order did not impede journalists' ability to report on the trial. The judge emphasized the fact that the press had received "special accommodations" including reserved courtroom seating, an audio feed to an auxiliary courtroom and the nearby pressroom, and reserved space outside the courthouse for broadcast reporters to present their reports.[587] Judge Matsch concluded by writing that if a special circumstance required a trial participant to make a public response, he would consider such a request promptly. However, unless and until such a situation presented itself, the gag order would stand.[588]

Reflecting on the events of March and April 1997, Stephen Jones said he considered network television coverage of *The Dallas Morning News* and *Playboy* confession stories to be more damaging than the individual print stories. Jones also said the timing of those stories dealt the defense a blow from which it could not recover:

> So I think the media basically sunk – I shouldn't say basically – they did sink any chance that McVeigh had for a fair trial. Now, even having said that, I believe that had the *Dallas Morning News*, *Playboy*, and *Prime Time* not occurred, and we could have gone into the trial without having that, that the playing field would have been fair. But after the *Dallas Morning News* – which came after the jury had received their summons, and they knew they were being summonsed for the McVeigh trial – the impact was devastating.[589]

Jones also said the decision to move forward with the trial following the confession stories was surprising to him considering the court's consistently cautious approach to fair trial/free press issues, especially those concerning pretrial publicity:

> Up to a certain point, Judge Matsch took the position that all publicity was bad – gag orders, change of venue, protect the identity of the jurors and so forth. I mean, he waxed very eloquently about that. Then as we got to the trial and we had *The Dallas Morning News* debacle, and two or three other things that happened. Then Judge Matsch seemed to do a 180-degree swing. And so now, it didn't make any difference what people read in the newspapers or saw on the television. Jurors when they take an oath, they leave all of that at the door, and they decide the case fairly. Well, obviously people change their minds, and he may have changed his mind. But I think that Judge Matsch, and certainly I'm on record with my respect for him, I think Judge Matsch was truly shocked at the toxic vitriol of the media and how it could enter into his courtroom. And it was the sort of 900-pound – not an 800 pound – a 900 pound gorilla that sat in the living room that nobody past a certain point – when I say nobody I mean the court – wanted to pay attention to it.[590]

The Press Protests at McVeigh's Jury Selection

The push to trial was moving forward in late March through April 1997, and the court was in the process of jury selection. Judge Matsch was concerned about keeping prospective jurors' identities secret, and he put procedures in place to meet that goal. This raised new fair trial/free press concerns about the openness of the jury selection process. The court would deal with the issue based on judicial discretion, and that

decision would affect the trial by serving as a precedent for the later trial of Terry Nichols.

As jury selection began, the press complained that the court was being too secretive about the process.[591] The press first objected to a wall that had been constructed in front of the jury box that prevented people seated in some areas of the courtroom from seeing the jury box. The court had constructed the wall during a remodel of the courtroom in late 1996, in part, to accommodate the closed-circuit camera.[592] The court claimed the wall would shield jurors from the camera's view. It would also prevent jurors from seeing the camera's location, and it would keep jurors from being distracted by the camera.[593] The press objected, claiming the court could not produce evidence showing how cameras affected juror behavior. The press claimed that if the judge were worried about courtroom sketch artists drawing details of jurors' faces, the court could establish rules regarding jurors.[594]

Both defense teams and prosecutors argued in favor of the jury wall. They claimed the court had a legitimate interest in protecting the jurors' identities. The defense teams claimed the jury wall prevented spectators from watching juror reactions and possibly misinterpreting those reactions. Furthermore, they argued the court had a duty to protect jurors – especially jurors serving on a highly publicized, highly emotional case.[595] Judge Matsch denied the objection of the press to the jury wall, and it would remain in the courtroom.[596]

The second fair trial/free press issue related to the jury was a press objection to the secrecy surrounding the identity of jurors. To protect juror identities, Judge Matsch assigned jurors numbers to use in place of their names. He ordered the transcripts of the

voir dire to be sealed until after the jury had been seated. Also, the judge heard attorney challenges to jurors in private instead of in open court.[597] The prosecution and both defense teams moved in favor of the court's procedures to protect jurors' identities.[598]

Judge Matsch relied on judicial experience and discretion in denying the press motion and kept his procedures in place. The judge determined that opening transcripts and identifying jurors would not advance the interests of a fair trial. Furthermore the judge determined that identifying jurors could pose a threat to their safety.[599] Also, the judge expressed concerns about the press speculating on jurors' personal beliefs. In a hearing on the matter, *The Rocky Mountain News* quoted Matsch as saying: "People who serve on a jury do not consent to a strip search of their psyches."[600] The procedures for protecting jurors' identities would continue through jury selection and through the trial of Timothy McVeigh.[601]

Judge Matsch considered the publication of juror names and personal information a threat to the defendant's right to a fair trial and a threat to the jurors' safety and wellbeing. The judge weighed the interests of the press against the interests of the court, the defendant, and the jurors. He came to the conclusion that the interests of the latter took precedent over the interests of the former.

When opening statements in the McVeigh trial began on April 24, 1997, the expected press invasion of Denver was in full effect.[602] Reports about the consortium suggest that at the beginning of the McVeigh trial it had more than 130 member organizations, but, by the end of the trial, that number had fallen to approximately seventy.[603] In all, the consortium would register more than 2,000 journalists for court credentials including foreign journalists from Brazil, Germany, Italy, and Japan.[604]

The consortium's logistical plans would break new ground in newsgathering technology. News organizations covering the trials made extensive use of fiber optic lines. This made the Oklahoma City bombing trial coverage "one of the first major events in which about half the video coverage [was] carried over fiber optic lines (instead of by satellite)."[605] Also, the consortium arranged for the establishment of a Web site that would serve as a clearinghouse of court information for journalists. Navidec, Inc. of Englewood, Colorado, donated the computer equipment and support for the project. The password-protected Web site allowed consortium members anywhere with Internet service to get access to daily trial summaries and other court documents posted on the site by the court clerk's office. Consortium director Wayne Wicks claimed that the Oklahoma City bombing trials were the first trials to use the Internet in such a fashion.[606]

On June 2, 1997, the Denver jury found McVeigh guilty on all counts.[607] Two weeks later, on June 13, the jury reached a decision on punishment, recommending McVeigh should be sentenced to death for the Murrah Building bombing.[608] The court's focus then turned to Terry Nichols and preparations to bring his case to trial.

Nichols Trial Preparation and Sealed Documents Appeal

With the McVeigh trial over, the court turned its attention to the case against Terry Nichols. In most respects, the trial for Nichols would follow the same pattern as the McVeigh trial. However, the press was not done with the fair trial/free press issue of sealed documents. The press had appealed Judge Matsch's order to seal and redact portions of the severance documents. The Tenth Circuit Court would hear the appeal,

and it would cite precedent in its decision. The effect on the case was that Judge Matsch's orders for sealed documents would stand through the Nichols trial.

In late June 1997, Judge Matsch set the trial date for Nichols. The trial would begin on September 29, 1997.[609] Michael Tigar would stay on as Nichols's chief counsel, but the government brought in a new prosecutor for the case. Assistant U.S. Attorney Larry Mackey of Indiana would lead the government's case against Nichols.[610]

As the court prepared to try Nichols, the Tenth Circuit Court of Appeals took up the press appeal of the sealed documents related to the severance motions for McVeigh and Nichols. In July 1997, the Tenth Circuit justices made their decision. They upheld Judge Matsch's decision and his five-part test for sealing documents that had been used since he took over the case.[611]

In the appeal, the press came before the Tenth Circuit, claiming a First Amendment right, through *Press-Enterprise II*, and a common law right to the documents submitted in the severance proceedings. Press attorneys also said the nature of severance proceedings heighten the importance of making documents presented at those proceedings public. Press attorneys argued that the public needed to see the evidence submitted at severance hearings to fully understand the reasons the defendants were seeking separate trials.[612] Press attorneys further claimed that documents submitted at severance hearings became public upon submission to the court and that concerns about prejudicial pretrial publicity caused by publication of these documents was not enough to warrant closure. If any parties did seek closure, the press argued that the court should follow its established procedures to prove the need for closure at a

hearing and to only allow closure if and when the court found other remedies did not exist.[613]

In their opinion, the Tenth Circuit justices wrote that they had not previously recognized a First Amendment right to court documents in any previous rulings and that they would not do so in the press appeal of Judge Matsch's decision. However, the court recognized that other courts had used the standards of *Press-Enterprise II*, and those standards served as the foundation of Judge Matsch's five-part test for sealing documents in the present case. Based on that premise, the court assumed the standards of *Press-Enterprise II* and its experience and logic test in consideration of the press appeal. Applying the experience and logic test to the documents in question, the court sought to determine "(1) whether the document is one which has historically been open to inspection by the press and the public; and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'"[614] The court made note of the special circumstance involved in a case such as the Oklahoma City bombing, saying the context of the case was an important consideration in reaching the decision. The justices wrote:

> In evaluating the district court's orders regarding these particular documents, it is important to bear in mind the extraordinary context of this case as a whole. A high-profile case such as this imposes unique demands on the trial court, and requires the court to establish procedures for dealing effectively, efficiently and fairly with recurring issues such as whether documents should be placed under seal or redacted.[615]

The Tenth Circuit decision first addressed the motions to suppress evidence. The justices found a tradition of openness to suppression hearings and suppression motions. The court stated that there was an important public interest in access to suppression hearings and motions, since they allowed public scrutiny of the investigation process. However, the court claimed that the right of access to suppression hearings and motions did not extend to the evidence that was deemed inadmissible through the hearing.[616] The justices wrote, "Access to inadmissible evidence is not necessary to understand the suppression hearing, so long as the public is able to understand the circumstances that gave rise to the decision to suppress."[617] Furthermore, the court determined that making suppressed evidence public would present a risk of exposing potential jurors to evidence that would be inadmissible at trial. The court determined that by holding public suppression hearings and by releasing redacted motions, Judge Matsch had satisfied the common law right of access to suppression hearings and motions.[618]

Next, the court addressed Nichols's statements to the F.B.I., referred to as Exhibit 72. The court ruled there was no tradition of access to such documents. The court also pointed out that Judge Matsch ruled the statements were inadmissible at the McVeigh trial and publicizing the statements could prove detrimental to the defendant's rights to a fair trial. Finally, the justices determined that the public had access to the hearing where the statements were discussed and that by being present, the public was able to gain a general understanding of the issues before the court concerning Exhibit 72. The court ruled Judge Matsch's order to keep Exhibit 72 sealed should stand.[619]

Finally, the Tenth Circuit addressed the severance motions. Here the court refused to decide whether there was a First Amendment right of public access to the

motions. Instead, the court applied a balancing test that weighed the First Amendment interests of the press and public against the defendant's Sixth Amendment right to a fair trial. The justices wrote that in making their cases for severance, the defendant's attorneys had to demonstrate "that their defenses were mutually antagonistic."[620] To show the conflict between the defense strategies, the attorneys had to explain in detail various aspects of trial strategy. The court claimed that granting public access to documents explaining these strategies "would create a Hobson's choice between the need to obtain severance and the need to protect the client's interest in avoiding prejudicial pretrial publicity."[621] The justices wrote that Judge Matsch gave greater consideration to the defendant's positions when he released redacted copies of the motion, and the appellate court "declin[ed] to second-guess the district court's conclusion."[622]

In the summer of 1997, the Tenth Circuit Court of Appeals made a decision on what had been one of the oldest fair trial/free press issues in the Oklahoma City bombing case – sealed documents. The court determined Judge Matsch's five-part test based on the experience and logic test of *Press-Enterprise II* met constitutional standards. This ruling affirmed the court's process that had been in place since January 1996. That process would extend through the trial of Nichols, but there would still be one final attempt to overturn Judge Matsch's sealed document procedures.

From July through September 1997, the court focused on preparing for the trial of Nichols. The court reissued the gag order issued before the McVeigh trial in an effort to prevent potentially prejudicial statements about press coverage.[623] There would be

some familiar fair trial/free press issues that would come back before the court prior to the Nichols trial. The first of these was another motion for a change of venue.

One month before jury selection was to begin, fair trial/free press issues would be raised again when Nichols's attorneys made a bid to have the trial moved. Again Nichols's attorneys presented the court with a report from media analyst Scott Armstrong. Armstrong claimed press coverage of the McVeigh case had created a bond of sympathy between people in Oklahoma City and Denver, threatening Nichols's chances for a fair trial in Denver. Armstrong's analysis of newspaper coverage in Denver showed that *Denver Post* coverage of the case surpassed that of *The Oklahoman* by 152% between mid-February and mid-March 1997. Near the end of the McVeigh trial, Armstrong claimed the *Post's* coverage exceeded the *Oklahoman's* by 217%.[624] Nichols's attorneys wrote, "Media coverage has now made it impossible for a jury in this district to make – if called upon – the reasoned moral response required by the cases."[625] Nichols's lawyers asked the court to consider moving the trial to San Francisco, California. Prosecutors objected to the request, accusing the defense of seeking a trial in San Francisco because the city had a "reputation as a liberal, anti-death-penalty jurisdiction."[626]

Judge Matsch exercised his discretion and denied Nichols's change of venue motion on August 15, 1997.[627] The judge determined the Nichols team had not shown a "sufficient basis for presuming such community prejudice."[628] The judge said allegations of a bonding between the people of Denver and Oklahoma City were not supported by his experience with juries, and the case would continue as scheduled in Denver.[629]

The Nichols team had approached the court with the same expert and the same argument that had persuaded Judge Matsch to move the case to Denver – prejudicial pretrial publicity. However, the argument was not as persuasive in August 1997 as it was in January 1996. Judge Matsch had seen the McVeigh case through with what he determined was a fair jury, and he indicated Nichols too could receive a fair trial before an impartial jury in Denver.

Like McVeigh, Nichols would face an incriminating press report based on confidential information just days before jury selection was to begin. This time the confidential information came in the form of an F.B.I. report Nichols's attorneys claimed the government had leaked to *The Oklahoman*.[630] Reporter Nolan Clay wrote that the information came from the transcript of Nichols's April 21, 1995, statement given to the F.B.I. at the Herrington, Kansas, police station. Clay's lead paragraph read, "Bombing defendant Terry Nichols told the FBI he had agreed that 'possibly' something should be done about the deaths of the Branch Davidians near Waco, Texas, when talk at gun shows turned to that tragedy."[631] The article appeared on the newspaper's front-page on September 15, 1997.[632]

The report appeared to be based on Nichols's statements to the F.B.I. (Exhibit 72), which the Tenth Circuit had determined two months earlier had been legally sealed by Judge Matsch.[633] *The Oklahoman* article read:

> Much of what Nichols said has been disclosed publicly since then [at pretrial hearings]. But a still-secret report of the interrogation shows that Nichols acknowledged taking part in discussions at gun shows about the 'murder' of the Davidians by federal agents.[634]

The article went on to claim that the document showed Nichols admitted to talking with McVeigh about bomb design and bomb building, but Nichols claimed he personally never made any bombs with McVeigh.[635] The government denied leaking the sealed statements to the press.[636] The record does not show the incrimination story about Nichols's led to any action in the court, and the case moved forward with jury selection beginning on September 17, 1997.[637]

Press coverage of the Nichols trial would be less intense than coverage of the trial of McVeigh. The consortium remained intact, but membership dwindled prior to the Nichols trial.[638] By September 1997, the consortium claimed sixty-six members, and only one hundred journalists covered the first days of jury selection in the Nichols trial. Twice as many had covered the first day of McVeigh's jury selection.[639] Consortium director Wayne Wicks attributed the low turnout to budget constraints.[640] The consortium would operate through the Nichols trials under the same policies and procedures established during the McVeigh trial.[641]

The fair trial/free press issue of open juror challenges would be raised again in the Nichols trial. How the court resolved the issue would result in the most significant procedural change between the trials of McVeigh and Nichols. Once individual *voir dire* began on September 30, 1997, Michael Tigar asked the court to conduct challenges in open court.[642] Tigar argued that open challenges brought transparency to the proceedings and instilled public confidence in the process.[643] Reflecting on his reasoning, Tigar said:

> I believe that if a judge has to get on the bench in the presence of the media and the public and make his or her rulings in open court, that the judge is going to be

> more careful about it. Not that the judge will particularly be aware of doing that, but it's just a psychological thing about when we have to face the public. That's a view I've held for a long time. That's why we seek oral argument on motions. That's why we seek oral argument in appeals. Because we, the lawyers, we want the judges to have to do it out in public, and I think the public is benefited by watching the justice system operate.[644]

Judge Matsch agreed to the change on October 1, 1997, but he cautioned attorneys they would have to be careful not to reveal private information about potential jurors during challenges.[645] Judge Matsch would continue to use numbers in place of juror names and the jury wall to protect jurors from the closed-circuit camera.[646]

On December 23, 1997, jurors found Terry Nichols guilty of conspiring to bomb the Alfred P. Murrah Federal Building, but they did not find him guilty of murder. Instead the jury found Nichols guilty of involuntary manslaughter in the deaths of eight federal agents who died in the bombing.[647] Nichols still faced the possibility of the death penalty following his conviction on the conspiracy charge, but on January 7, 1998, jurors told Judge Matsch they were deadlocked in their punishment deliberations.[648] It was left to Judge Matsch to determine Nichols's fate, and that would not happen until June 1998.

Final Disposition

Though testimony in the Nichols case was over, the debate over fair trial/free press issues in the case was not. Between Nichols's conviction and sentencing, two more fair trial/free press issues would be raised regarding sealed documents and the closed-circuit broadcasts.

Despite the Tenth Circuit's ruling in July 1997, the press had not given up the fight seeking access to sealed documents. *The Dallas Morning News* and more than sixty other news organizations went to the United States Supreme Court with an appeal of the Tenth Circuit Court's decision to uphold Judge Matsch's procedures for sealing documents. On Monday, February 23, 1998, the Supreme Court declined to consider the case without comment.[649] The fair trial/free press issue of sealed documents, which had led to such loud clamoring from press attorneys, prosecutors, and defense attorneys, ended with a hollow silence at the High Court.

In April 1998, the closed-circuit issue was raised again. Citing the interests of victims and the success of the closed-circuit broadcasts at trial, prosecutors asked the Tenth Circuit Court of Appeals to bring cameras into its courtroom for arguments on Timothy McVeigh's appeal.[650] In their motion, prosecutors wrote:

> Closed-circuit transmittal of trial court proceedings in this case has had . . . the very positive effect of allowing bombing victims to observe our justice system at work, with no adverse impact on the trial. The interests of justice likewise would be served by allowing those same victims the opportunity to view the appellate argument.[651]

Appellate court rules did not permit cameras, but prosecutors claimed the appellate court was bound by Section 235 of the Antiterrorism Act that had led to closed-circuit coverage of the trials.[652] The Tenth Circuit justices disagreed. On April 7, 1998, the appellate court denied the government's motion without comment.[653]

Prosecutors considered the unprecedented closed-circuit broadcasts a success. So much so, that they sought to have the broadcasts extended to the appellate

proceedings. The lead defense attorneys reflected on the closed-circuit experience with differing opinions. Michael Tigar said the closed-circuit broadcasts did not have a negative impact on the Nichols trial, and he gave credit to the court's protocols and procedures for the broadcasts:

> The law was very specific and, in the end, given the limitations that the statute and then [the limitations] that Judge Matsch imposed on the process … I don't think that I could say that it had any adverse effect. By the way, let me add something to that. I think that one thing you might want to consider is that maybe the trial even should be videotaped and the videos sealed until after all of the appeals are over, and that's so the public can see an iconic trial and see what happened. I have no objection. I have no objection to that, and I think it's a good idea.[654]

Stephen Jones said his concerns about the closed-circuit signal being pirated did not come to pass.[655] He gave the court credit for maintaining security of the signal. Still, Jones said he thought the closed-circuit broadcasts ultimately had a negative effect on the McVeigh trial. Jones claimed that the broadcasts allowed victim viewers to become media commentators on the case:

> The effect of it though was to give people in Oklahoma City who saw it to go outside and make statements from the steps of where it was shown [the F.A.A. Center in Oklahoma City]. So it continually re-circulated all of the prejudicial comments, all of the cheerleading for the government that did not occur in Denver because there were very few people present [in Denver] that represented the victims or the survivors of the bombing. Most of the media's attention in

> Denver was focused mostly on the trial rather than scoring points for the government or for the defense. But the Oklahoma City group basically was a cheerleading squad or a high school pep squad for the government's version of the case.[656]

The final act in the Oklahoma City bombing federal trials came on Thursday, June 4, 1998. That day, Judge Matsch sentenced Terry Nichols to life in prison for his role in the bombing.[657] McVeigh's death sentence was carried out on June 11, 2001, when he was executed at the federal prison in Terre Haute, Indiana.[658] Nichols later stood trial in Oklahoma for the deaths of the other 160 persons not covered by the federal indictment. On May 26, 2004, an Oklahoma jury found Nichols guilty of all 160 counts of murder and other related charges.[659] Like the federal jury, the Oklahoma jury could not reach a punishment decision, and on August 9, 2004, Oklahoma District Judge Steven Taylor sentenced Nichols to 161 consecutive life terms.[660] Nichols will most likely never leave prison alive. Should the federal government ever release him from custody, the Oklahoma Department of Corrections would immediately take him into custody to begin serving his life terms in Oklahoma.

Stephen Jones and Michael Tigar both said that fair trial/free press issues were some of the most important issues raised in the Oklahoma City bombing case and that the court's handling of those issues had significant effects on management of the trials. Both attorneys also said that how the court and the individual participants managed those fair trial/free press issues might be the longest-lasting legacy of the case.

Tigar said the bombing case provides a model for all participants in highly publicized cases about the decisions they face in dealing with the press:

> All of the participants have a job to do to be responsible. The first is that the prosecutors and the police have to control themselves. That means the prosecutors have to control the police, and in these federal cases they have to control the F.B.I. The second thing is that the judge has to take charge of things, and Judge Matsch did … There are other judges who have not and we've had bad effects. And the third thing is the defense counsel has to make a decision. And I tell lawyers I believe that, sure, *Gentile v. State Bar of Nevada* tells you what you have a First Amendment right to do, but you'd be a fool to do it. Because sound bite journalism – you know broadcast journalism – you're working to a deadline. You've got to edit, and the lawyer is of course in no control over what's decided to edit, so the lawyers have to restrain themselves there. As Thomas Jefferson said, "He who approaches the media takes a wolf by the ears."[661]

Stephen Jones pointed out that despite appeals that went all the way to the Supreme Court, no court overturned any of Judge Matsch's orders, protocols, or procedures addressing fair trial/free press issues:

> Matsch's opinions and orders of that case are a handbook for federal judges, and for that matter, state judges that want to control the toxic vitriol of the media, and he showed them how to do it. And it came at a point probably in our history where a lot of judges and people in the system thought it had gone too far and that some restriction had to be made – this balancing between the Sixth Amendment, and the Fifth Amendment, and the First Amendment – was being tilted far too much to the media's side.[662]

In conclusion Jones stated:

> I think twenty-five years after the case, as people begin to look at the effect of it since then, that that [fair trial/free press issues] may turn out to be the most lasting impression on American jurisprudence, rather than the trial itself and McVeigh and the bombing. It will be the impact on what might loosely be called the legal media framework. I certainly was not a fan of the First Amendment after the trial.[663]

CHAPTER IV

Discussion and Conclusions

The findings of this study confirm that fair trial/free press issues were important aspects of the Oklahoma City bombing case. These fair trial/free press issues began to emerge with the initial court appearance for McVeigh in April 1995 and continued through the trials of both McVeigh and Nichols. Along the way, the courts resolved these issues, using precedent, and, in some cases, using judicial experience and judicial discretion. The decisions the courts made regarding fair trial/free press issues in the bombing case had a direct impact on the courts' management of the case. This was perhaps most evident in the decision to move the case to Denver, Colorado. Fair trial/free press decisions also had consequences outside the courtroom including the formation of the press consortium and the Congressional action that led to closed-circuit viewing.

The closed-circuit broadcast of the trials was truly a unique feature of the Oklahoma City bombing trials. The court faced an unprecedented decision regarding whether to allow closed-circuit broadcasting. Once the court agreed to allow the broadcast, the procedures designed to provide the broadcasts had a further impact on how the case was managed. Fair trial/free press issues were such an integral part of the Oklahoma City bombing case that it is not possible to fully understand how the case moved through the legal system without an understanding of the fair trial/free press issues the courts faced. Despite the evidence that conflicts between the First Amendment and the Sixth Amendment were an important aspect of the Oklahoma City

bombing case, these issues have remained relatively unexplored by researchers prior to this study.

This chapter will discuss the fair trial/free press issues of the Oklahoma City bombing case as revealed in the findings of the study. The discussion will examine each issue in respect to each of the study's five research questions. The first three research questions asked: What were the fair trial/free press issues brought before the courts in the Oklahoma City bombing trials? How did the courts employ precedent and protocol to resolve the fair trial/free press issues present in the Oklahoma City bombing trials? How did the courts' resolution of the fair trial/free press issues affect the courts' management of the Oklahoma City bombing trials?

The study also examined one of the most unique issues in the trials, which was the use of closed-circuit broadcasting. Two research questions explored this unprecedented aspect of the trials. Research questions #4 and #5 asked how the closed-circuit viewing provisions became part of the Antiterrorism and Effective Death Penalty Act of 1996 and how the court implemented and managed the provisions.

Some of the fair trial/free press issues identified in the findings were unique to the Oklahoma City bombing case, and others were consistent with issues present in previous cases. In resolving the fair trial/free press issues in the bombing case, the courts sometimes looked to precedent and at other times relied on judicial experience and discretion. The resolution of almost every fair trial/free press issue in the case affected its management to some degree. This discussion will examine these findings and draw conclusions regarding how and why the courts resolved the fair trial/free press issues as they did. This will advance knowledge about the Oklahoma City bombing

case. It will also advance knowledge for legal and mass communication scholars examining conflicts between the First Amendment and the Sixth Amendment that the press and the courts face in all highly publicized trials. Understanding how those issues were resolved in the Oklahoma City bombing case will be of use to the courts and journalists in future cases.

Pretrial Publicity

The first fair trial/free press issue to emerge in the case was the issue of pretrial publicity. McVeigh's original attorneys, Susan Otto and John Coyle, were the first to suggest that pretrial publicity threatened McVeigh's Sixth Amendment right to a fair trial. They recognized that the massive amount of press coverage given to the case, especially in Oklahoma, meant that it might not be possible to find jurors who had not formed opinions about the case and the defendants prior to trial. Stephen Jones and Michael Tigar expressed similar concerns once they took over as counsel for the defendants. Prosecutors, on the other hand, never expressed concerns over prejudicial pretrial publicity. They had little reason to be concerned. The findings show a majority of the pretrial publicity, much of it based on leaks, implied McVeigh and Nichols were indeed guilty of the crime. With the bulk of pretrial publicity advancing and supporting the prosecution's theory of the case, prosecutors took the position that any possible prejudicial effects of pretrial publicity could not be known until attorneys began juror *voir dire*. Prosecutors also expressed the belief that thorough *voir dire* could screen out jurors who were biased against the defendants, ultimately leading to an impartial jury in the State of Oklahoma.

The findings show that the lengthy pre-indictment period created an environment in which pretrial publicity flourished. By the time the indictments were issued, three months had passed since the bombing. During that time, Tigar claimed to have collected more than 1,700 newspapers stories from across the country about the bombing with more than 1,000 of those stories appearing in Oklahoma newspapers. These newspaper stories along with more than 900 broadcast transcripts would be entered as evidence in the change of venue motions filed in November 1995. Other specific elements of pretrial publicity that emerged in the findings as important were the video and photographs of McVeigh being escorted from the Noble County jail prior to his first court appearance, Governor Keating's statements to the press referring to McVeigh and Nichols as "creeps," and the video and photographs of McVeigh and Nichols in chains leaving the Oklahoma County jail for the change of venue hearings.

Previous research concluded that pretrial publicity and its potential to affect jurors has been a primary concern for courts handling highly publicized cases throughout American judicial history. As far back as the Aaron Burr trial of 1807, the courts recognized that the First Amendment right of the press to report on crimes and court cases could be prejudicial to a defendant's Sixth Amendment right to receive a fair trial. The literature shows that in the 1800s the solution to the problem was extensive *voir dire* to determine whether potential jurors exposed to pretrial publicity had formed firm opinions biased against defendants. This was the remedy established by the Aaron Burr case and the George Reynolds case.

By the mid-twentieth century, the press coverage of infamous crimes had become more pervasive in America. Radio and television had joined newspapers and

magazines as means of distributing information. Scholars investigating the issue report that in the 1950s and 1960s, the Supreme Court became increasingly troubled about the impact all of this press coverage had on the judicial system. In *Shepherd v. Florida*, Justice Frankfurter called pretrial publicity "...one of the worst menaces to American justice."[1] In its *Irvin v. Dowd* decision, the Court specifically referenced the increasingly pervasive press and the effects such coverage might have on potential jurors. Still, none of the fair trial/free press cases of the 1950s and 1960s that established the foundational precedent for mitigating pretrial publicity took place in a media environment similar to that of the Oklahoma City bombing case.

The Oklahoma City bombing case was like no other case seen before. The crime itself was an attack committed against the United States of America by citizens of the United States that resulted in the deaths of 168 victims. Like the important fair trial/free press cases of the 1950s and 1960s, the Oklahoma City bombing case was covered extensively by the press, but in the mid-1990s, the press included twenty-four-hour cable news programs and the burgeoning Internet. These aspects of an even more pervasive press made pretrial publicity much more of a concern in the bombing case than previous courts had seen.

The findings show the primary precedent-setting case concerning pretrial publicity was *Sheppard v. Maxwell*. The Supreme Court decision in this case was the culmination of the Court's frustrations that had built during the 1950s and early 1960s. *Sheppard v. Maxwell* established guidelines for judges to follow to preserve the possibility of a fair trial in cases that received intense press coverage. The guidelines included: (1) Courts have the ability to limit statements made by court personnel and

law enforcement, and the court should exercise this ability. (2) The court can delay the trial until media attention dies down. (3) The defense may ask for a change of venue. (4) *Voir dire* should be thorough, and it should focus on pretrial publicity in cases that have drawn intense media attention. (5) The court can sequester the jury to prevent jurors from being influenced by the media or others outside the case. These were the prescriptive measures available to the trial court in the Oklahoma City bombing case, and the court would utilize some of them in its management of the case. The court's efforts to mitigate pretrial publicity utilizing the prescriptive measures of *Sheppard v. Maxwell* had multiple effects in the Oklahoma City bombing trials including a rare federal change of venue and two orders to limit the out-of-court statements. The findings show that pretrial publicity was the most significant fair trial/free press issue present in the bombing case. It was at the center of almost every other fair trial/free press issue raised in the case, and how the court dealt with this issue and related issues had an effect on management of the case.

Defense Team Press Strategies

The findings show the defense teams had concerns about pretrial publicity. Both defense teams developed strategies for dealing with the press in light of these concerns, but the strategies they developed were quite different from each other. Michael Tigar's strategy for the Nichols team was to avoid speaking to the press as a rule. Tigar wanted to exert as much control as possible over information that would come from the Nichols team and be reported in the press. For this reason, Tigar rarely did interviews with reporters. Tigar said his dramatic post-indictment press conference was a calculated move to make a clear statement about his client in a forum that would draw a large

number of reporters at a time such a statement was relevant and in a manner in which he would have control of the situation. The Nichols team employed this information control strategy throughout the life of the case.

Tigar had argued *Gentile v. State Bar of Nevada* before the Supreme Court, and the experience obviously influenced his press strategy for the bombing trial. Tigar's decision to make a single public statement before the assembled press immediately after Nichols's indictment was precisely the same strategy employed by Dominic Gentile in 1987. At the press conference, Tigar stated the general nature of the defense (Terry Nichols wasn't there) and he held up a sign stating the same for emphasis. Tigar may have pushed the boundaries of the A.B.A. Model Rules by claiming Nichols was innocent, but following the post-indictment press conference, he never actively sought an audience with the press to make proclamations about his client. Tigar said *Gentile* defined the boundaries of pretrial attorney speech, and he knew those boundaries as well as anyone, having argued the case before the Supreme Court. In the Oklahoma City bombing case, Tigar had the opportunity to put the lessons of *Gentile* into practice, and he did so with a very conservative strategy.

Stephen Jones employed a completely different press strategy. This was due to the fact that prosecutors and the press both focused more attention on McVeigh. Moreover, the McVeigh team also faced a pretrial publicity problem the Nichols team did not – the video and photos of McVeigh being escorted from the Noble County courthouse. Jones clearly believes the impact of the Noble County walkout was highly prejudicial, and the court would come to agree with that assessment as stated in the change of venue order issued in February 1996. Fighting the negative public image of

McVeigh would spur Jones to reach out to the press in an attempt to make press reports work in his favor.

Jones did not shield himself from the press as Tigar did. Instead, Jones made himself available to the press, and he also made McVeigh available to the press. Jones explained his strategy as having three components. The first component was a public relations campaign to try to improve McVeigh's image in public consciousness. This was the motive behind McVeigh's interviews with reporters and Jones's release of McVeigh's military records. The second component was the development of a *quid pro quo* relationship with the press through which the McVeigh team could barter information with individual journalists. This tactic could potentially further positive press about McVeigh, while also serving as an informal information collection tool for the McVeigh team. The third component was the leverage Jones claimed to gain with journalists through the *quid pro quo* tactic. Jones believed at the time that by making himself available to the press, he could develop relationships with reporters that would allow him to stop some reports that could be damaging to McVeigh, which he claimed he did on occasion.

The McVeigh team faced a tougher battle in the court of public opinion than the Nichols team. The investigation had identified McVeigh as the leader of the conspiracy and the person who actually detonated the bomb, and because of this, the press focused more attention on McVeigh. The Noble County walkout further solidified McVeigh's image as the prime suspect. Jones claimed the negative publicity about McVeigh was fueled to a large degree by persistent and pervasive information leaks from the government. It was exactly this type of situation that Justice Kennedy and the minority

had envisioned in *Gentile* when they argued for lesser constraints on attorney pretrial speech. Like the *Gentile* minority, Jones believed he was obligated to aggressively defend McVeigh in the court of public opinion and to make attempts at stemming the tide of prejudicial publicity against McVeigh.

The development of strategies for dealing with the press was not a unique aspect of the Oklahoma City bombing trial. Lawyers in any high profile case must consider how they will present themselves and their clients to the public. What is worthy of mention about the bombing trial is that it presented a highly publicized post-*Gentile* case in which two attorneys representing two different clients developed press strategies that mirrored the divided court in the *Gentile* decision. Tigar and the Nichols team took a conservative approach, staying well within the limits supported by the Rehnquist majority in *Gentile*. Jones and the McVeigh team took an aggressive approach similar to that proposed by the Kennedy minority in *Gentile*. The Oklahoma City bombing case was a practical application on a grand stage of the precedent established in *Gentile v. State Bar of Nevada*, and fair trial/free press scholars can learn much from viewing the case through the *Gentile* framework.

Sealed Documents

The court's practice of sealing large numbers of documents became a fair trial/free press issue early on in the Oklahoma City bombing case. The press and the public had a keen interest in documents related to the case, and the amount of documents was extensive due to the depth and complexity of the investigation. The findings show that the court was quite wary of allowing access to court documents from

the beginning of the case, and this set up a fair trial/free press conflict between the press and the courts.

From the beginning of the case, Western District judges allowed virtually blanket sealing of court documents. The press challenged this action as being "constitutionally deficient," and they had precedent on their side. The Supreme Court had previously recognized a tradition of openness in the courts through a line of cases beginning with *Richmond Newspapers v. Virginia* and extending through *Globe Newspaper Inc*., *Press-Enterprise I*, and *Press-Enterprise II.* Through these cases, the Supreme Court consistently stated that the openness of the courts was essential to ensuring public confidence in the judicial system. The Court came to conclude that limiting access to the courts in some instances was not unconstitutional but that any limits on access must be based on an overriding state interest. The trial court must show that closure is the only means of meeting that interest. The closure order must be narrowly tailored to meet the interest, and the court must hold hearings on the record to prove the criteria for closure.

The findings show the linage of cases beginning with *Richmond Newspapers* and extending through *Press-Enterprise II* addressing access to the courts established a common law right of access to court documents. This would be the precedent used by the court in the Oklahoma City bombing case to address the fair trial/free press issue of access to court documents. The court would also look to federal statute regarding the Criminal Justice Act attorney fee documents, and it would employ judicial discretion in deciding the issue.

Though the Western District judges had ultimately unsealed some documents, they did not establish a procedure for dealing with sealed documents before the case passed to Judge Matsch. Judge Matsch would ultimately decide how this fair trial/free press issue would be managed through the remainder of the case, and he found his guiding precedent in the experience and logic test of *Press-Enterprise II*. The experience and logic test recognized a qualified First Amendment right of access to the courts, but it also stated that right was "not absolute," meaning judges could in some instances use their experience and judicial discretion in determining whether a defendant's right to a fair trial took precedence over the press/public right of access.[2] The judge looked to precedent and exercised his discretion in crafting his five-question procedure for handling sealed documents for the remainder of the case. The findings show that the order met the standards established in *Press-Enterprise II* of establishing an overriding state interest, crafting an order narrowly tailored to meet those interests, and allowing for challenges prior to sealing documents.

Judge Matsch's test asked if there was a tradition of access to the documents in question, whether making the documents public would further or hinder the court's purpose, whether access to the documents would prejudice the public, whether access to the documents would negatively affect the defendant's right to a fair trial, and whether the sealing of the documents in question was essential to preserving that right. The test provided a framework through which to examine sealed document requests. The order also established a process for handling sealed documents. Judge Matsch instructed attorneys to be careful not to reveal discovery information in motions filed with the court. Attorneys wanting to file a document under seal, other than attorney fee

documents, were required to file a motion requesting a seal order and allow three days for objections before the judge would consider the motion.

The judge determined that Criminal Justice Act documents related to attorney fees had no presumption of openness. In fact, Judge Matsch wrote that federal statute and court rules specified these documents should be sealed. However, the judge's sealed documents order did establish a classification system for docket sheet entries of C.J.A. documents that would allow the press and public to know what type of service attorneys had requested, though specifics about the request and the dollar amount requested would not be disclosed.

The findings support the conclusion that Judge Matsch's sealed documents order affected management of the case by putting an end to the practice of broad scale document sealing. The order also affected case management by providing clear rules and procedures for the handling of documents related to the case. Though press attorneys did not get access to the attorney fee documents they wanted, the order did result in removing some secrecy surrounding the documents. The order did give the press an opportunity to challenge requests to seal non-C.J.A. documents filed by prosecutors or defense attorneys. The press appealed the order as being too restrictive and too deferential to the defendants, but that appeal was not successful.

The high level of press interest in bombing case documents clashed with the court's need to keep discovery and investigative information out of public discussion during the pretrial period. The Western District judges appeared to go too far in allowing almost blanket sealing of documents without allowing the public and the press to contest these seal orders. Judge Matsch recognized the problems of blanket sealing,

but he also recognized the threat posed by discovery information and attorney fee information going public. The judge's sealed documents order was an attempt to balance the First Amendment rights of the press and public with the Sixth Amendment rights of the defendants; however, the order gave deference to the defendants' rights. Judge Matsch's sealed documents procedures withstood press appeals to the Tenth Circuit and the United States Supreme Court, which declined to hear the case. The judge crafted an order governing sealed documents in one of the most highly publicized criminal trials in American history. The order was challenged and upheld on appeal. The fact that the order accomplished the goals of the court and withstood legal challenges suggests that other courts facing a similar situation might look to Judge Matsch's sealed documents procedures as a model.

Change of Venue

Another dominant fair trial/free press issue in the early months of the case was the issue of a change of venue. The findings show that calls for a change of venue came from the defense teams as early as McVeigh's initial appearance in late April 1995. Stephen Jones continued the effort in the pre-indictment period, and Michael Tigar would join the cause after the indictments. The main factor in the push for a change of venue was pretrial publicity. Granting a change of venue was one of the remedies specifically mentioned in *Sheppard v. Maxwell* for cases in which pretrial publicity threatened the court's ability to seat an impartial jury. This was exactly what the defense teams claimed had occurred in the early months of the bombing case. The defense teams claimed Oklahomans had been subjected to so much publicity about the bombing that finding an impartial jury panel in Oklahoma would be impossible. The

government said such claims were impossible to prove without attempting to seat an Oklahoma jury and a change of venue should not be considered unless and until it became apparent an impartial jury could not be found in the state.

The change of venue motions filed by the defense teams focused heavily on pretrial publicity. Though both defense teams and the government conducted polling of potential jurors, the findings show that evidence of pretrial publicity was a more important factor for the court in deciding the change of venue issue. Both defense attorneys said in interviews that the testimony of media expert Scott Armstrong was pivotal in their opinion. Armstrong testified that coverage of the bombing in the Oklahoma press was more extensive and of a different tone than press coverage in other states and in the national press. Armstrong said that the theme and tone of Oklahoma press reports had created a sense of kinship between bombing victims and the people of Oklahoma. Jones claimed that the videotaped statements from Governor Keating, including his comments from the May 25, 1995, press conference, were highly prejudicial. The potential effects of a high-ranking elected official making prejudicial statements were of great concern in the bombing case just as the literature shows they had been in the Manson trial. Further evidence of prejudicial publicity came from the video of McVeigh being escorted from the Noble County jail and the photos and video taken of McVeigh and Nichols leaving the Oklahoma County Jail while the change of venue hearings were taking place. The findings show that the episode at the Oklahoma County Jail greatly upset Judge Matsch, and the defense attorneys considered that episode a key element in the judge's decision.

The findings show Judge Matsch exercised one of the prescriptive measures referenced in *Sheppard v. Maxwell* in granting the change of venue. To make his decision, the judge considered the evidence offered at the hearings, and he exercised judicial discretion. There seems little doubt that the judge found the evidence of prejudicial pretrial publicity valid and compelling, but he saw little value in the polling data. Judge Matsch determined that the press had "demonized" the defendants and that the coverage had prejudiced Oklahomans against the defendants.[3] The judge referred to the testimony of Scott Armstrong in his order, noting the higher number of stories produced by the Oklahoma press and the framing of these stories that focused on sympathy for bombing victims. He wrote that the coverage had created a sense of family among the victims and the people of Oklahoma, suggesting that finding an impartial jury in the state would be difficult. The judge also said the repeated use of video showing McVeigh leaving the Noble County Courthouse and the images of McVeigh and Nichols taken during the change of venue hearings were further evidence of prejudicial pretrial publicity. Prosecutors claimed that moving the trial out of state would inconvenience victims and possibly violate their rights under federal crime victim statutes, but the judge said the defendants' rights to a fair trial took precedent over any claim by the victims. For these reasons, the judge granted the change of venue, guided by remedies provided by precedent and exercising his experience and discretion regarding the facts in evidence.

The judge's decision to grant a change of venue affected case management by physically relocating the case to Denver. This had the secondary effect of serving as the impetus for two more fair trial/free press issues the court would have to address in the

future – the press consortium and closed-circuit broadcasting. Almost immediately after the change of venue order was filed, the victims and members of Congress began working in earnest to draft closed-circuit legislation. Also, the press corps began to organize to prepare for covering the trials in Denver.

The Press Consortium

The findings show that the press addressed the challenges posed by the change of venue by organizing and forming the Oklahoma City Bombing Trial Media Consortium. The consortium provided the press with a means to work with the court and the City of Denver as a unified group. In this way, individual press organizations could meet their responsibilities to cover the case without being forced to manage logistics and communication with the court on their own. The court and the city also benefited from this arrangement. The findings show that Denver city officials were concerned that the bombing trial would bring a disorganized media free-for-all to the streets around the downtown courthouse similar to what had happened at the O.J. Simpson trial in Los Angeles. The city's interest was in maintaining order.

Other examples of massive press coverage of trials that created problems both inside and outside the courthouse can be found in the literature. The Hauptmann trial, the Sheppard trial, and the Estes trial were all cases in which aggressive coverage by the press was criticized by the courts and some journalists. By the time of the Oklahoma City bombing trials, these historic cases were well known to the courts and served as examples of what could happen if judges did not assert firm control and bring some sense or order to the activities of the press in and around the courthouse. The Supreme Court said as much in *Sheppard v. Maxwell,* claiming that the press had essentially

taken over the courtroom and that the judge had the power to prevent this and should have exercised this power.

The work of the consortium in conjunction with the city and the court meant the disruptive situations seen in other cases did not occur with the bombing trial. The number of reporters who received credentials to cover the McVeigh trial would eventually approach 2,000. Without some way to establish order outside the courthouse, the potential for pandemonium was high. The solution was the press work area on the courthouse plaza known as the bullpen. This gave trial participants and the press a common area designed for the interaction between the parties to prevent attorneys from being mobbed on the streets. Although press mobs did happen anyway, it appears that the bullpen was considered a success by the parties involved.

The court also avoided disruption of operations by working with the consortium to distribute documents and information to consortium members via the Internet. This appears to have streamlined operations in the court clerk's office while meeting the informational needs of the press corps.

Inside the courtroom, Judge Matsch exerted firm control, but the findings show that he did work with the consortium to accommodate the needs of the press as well. The judge held a special meeting with journalists before proceedings began in Denver to explain his courtroom rules and to express his expectations of how journalists would conduct themselves in his court. He set aside nearly half of the courtroom seats for the press but left ample seating available for the pubic, thus avoiding criticisms of showing preferential treatment of the press such as were noted in the *Sheppard* decision. Through the work of the consortium and the court, the press also enjoyed the benefits of

the auxiliary listening courtroom and the extension of the sound feed to the pressroom across the street from the courthouse.

One aspect of the court/consortium relationship that explains much about how and why the press and the court worked together as they did was the personality of Judge Matsch himself. The press accounts and defense attorney interviews paint a picture of Judge Matsch as a judge who held his profession and the administration of justice in the highest regard. He is described as having no tolerance for delays or distractions in his courtroom, and he set strict rules for how attorneys, witnesses, and spectators should behave in his court. He was not a judge who would be influenced by the press attention a case like the Oklahoma City bombing would bring to him personally. The literature shows that the Supreme Court had repeatedly claimed judges had the power to police their own courtrooms, and the Court had been critical of judges who had not exercised that authority – especially in highly publicized cases. To his credit, Judge Matsch did work with the consortium, but the findings show that it was always clear that he was in charge and that he would not tolerate any actions on the part of the press that threatened his authority or the administration of justice in his courtroom.

The consortium was a unique aspect of the Oklahoma City bombing trials. The literature does not indicate that an organized press group had formed to cover previous trials to the degree that the consortium did for the Oklahoma City bombing trials. The consortium was successful enough that Sacramento, California, city officials preparing for the 1998 Unabomber trial contacted Denver city officials for advice. Thus, the

Oklahoma City bombing trial consortium has and may continue to serve as a model for courts and cities dealing with cases that draw widespread press attention in the future.

Audio Feeds and Audiotapes

The use of audio feeds and audiotapes was a practice the court adopted to accommodate the press that became another fair trial/free press issue in the case. The first attempt at using an audio feed was at the change of venue hearings in Oklahoma City in January 1996. News reports indicate that the judge approved an audio feed to a second courtroom that would be used if more spectators showed up than the main courtroom could hold; however, later news reports indicate the overflow courtroom was not used at the hearings. Judge Matsch continued the practice once the trial moved to Denver. The judge allowed this because there were more reporters wanting seats in the courtroom than seats available. The judge was careful not to allow the press to take up all of the seats in the courtroom or to give them preferential seating. The Supreme Court had been critical of such arrangements in the Sam Sheppard case. Judge Matsch would eventually allow the audio feed to extend to the pressroom across the street from the courthouse but only after the press corps agreed to police its own and not tape or broadcast any of the sound feed.

The findings do not show that the judge followed any precedent in deciding to utilize the audio feeds case. What is notable is that the judge took steps he was not required to take in order to accommodate journalists. It is also notable that while the judge stood firmly on Rule 53 and its ban on broadcasting from the courtroom for other issues, he apparently did not view the transmission of the audio feed outside the courthouse as a violation of the rule. In the case of audio feeds, Judge Matsch placed the

responsibility of making sure the audio feed to the pressroom was not misused on the shoulders of the press corps, and the record shows the journalists met that responsibility.

The findings show that the fair trial/free press issue of audiotapes placed the court and the press corps at odds immediately after the practice began. Judge Matsch was following his own court rules and standard procedures when he allowed journalists to purchase audiotapes of the first proceedings in Denver. This taping of court proceedings and the sale of those tapes was allowed also under the rules established by the Judicial Conference. Both Stephen Jones and Michael Tigar believe the judge did not anticipate that broadcast journalists would use the actual recordings in their reports, but that was indeed what happened. Judge Matsch immediately stopped the practice of selling audiotapes, and the prohibition remained in place through both trials. In his order that stopped the sale of audiotapes, the judge looked to the precedent of Rule 53. He wrote that using the tapes in broadcast reports was the "functional equivalent" of live broadcasting.[4] The judge determined that this was a violation of Rule 53, and he permanently stopped the practice. Judge Matsch's decision to immediately and permanently end the practice of selling audiotapes meant the issue was immediately resolved and would not reoccur in the case.

Information Leaks

Information leaks were a fair trial/free press issue in the bombing case from the beginning. The defense teams accused prosecutors early on of leaking investigative information to the press. Later the government would accuse the defense teams of doing the same. The issue came to a critical point shortly after the case moved to Denver,

when the Nichols team asked Judge Matsch to conduct an investigation to determine the source of information leaked to the press around the time of the first anniversary of the bombing. The findings show that the defense teams had the greatest concerns over leaked information. They feared investigative information leaked by the government would prejudice potential jurors against McVeigh and Nichols. Both Jones and Tigar said in interviews that leaks were a constant problem for the defense teams throughout the case.

The defense teams claimed that leaks most often originated with the government and that the stories produced from leaked information were prejudicial toward the defendants. Jones and Tigar both cited instances where reporters claimed to have gotten investigative information that should not have been released from government sources. The defense claimed the government held a decided advantage in access to the press through the institutional links between journalists and law enforcement sources. The defense also claimed the government used these institutional links to leak information about the case. In a case like the bombing case with vast amounts of information and investigators, finding the source of individual leaks would be difficult if not impossible.

The findings do not show Judge Matsch used any guiding precedent in deciding whether to investigate information leaks. Instead, Judge Matsch exercised judicial discretion in deciding not to conduct an investigation. The judge explained his decision by saying such an investigation would be difficult since there were so many people with access to information about the case. He also said that an investigation would delay the trial and that it would distract the court from its objective of getting the case to trial. The findings suggest Judge Matsch was particularly concerned with moving the case to trial

as expeditiously as possible. He feared a lengthy delay to investigate leaks would unnecessarily delay the process and perhaps allow more time for more stories based on leaks to surface. It is possible, however, that had Judge Matsch thoroughly investigated the leaks, it would have shown both prosecutors and defense attorneys that he was serious in his efforts to clamp down on prejudicial pretrial publicity based on leaks. It is also possible such a firm stance demonstrated by the court could have prevented later problems created by information leaks.

The court's failure to address information leaks prior to June 1996 placed attorneys, primarily defense attorneys, in a position where they had to decide whether or not to respond to sensitive information revealed in the press. The defense teams in particular felt this put them at a distinct disadvantage. Ultimately, Judge Matsch decided to address the issue with orders that would restrict out-of-court statements, which directly affected case management. However, by the time the court issued the first restrictive order in June 1996, the case had been plagued by information leaks for more than a year.

Restrictive Order and Gag Order

The Nichols team and the government had both asked for a gag order to resolve the issue of leaks, but the McVeigh team opposed the idea. There was precedent for restricting out-of-court statements in such a highly publicized case. This was one of the remedies mentioned in *Sheppard v. Maxwell*. In that decision, the Supreme Court wrote that had the court restricted out-of-court comments by attorneys and investigators, the press, "would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom – not pieced together from extrajudicial statements."[5] The

judge in the Manson case issued a gag order immediately after the indictment to try to limit extrajudicial statements and any effects they might have on potential jurors. *Nebraska Press Association* showed that courts could not gag the press, thus the remedy would have to be focused on the parties under the control of the court.

Judge Matsch initially took a less severe approach than issuing a gag order by issuing a restrictive order instead. The restrictive order placed some limits on statements made outside of court and offered guidelines for participants when speaking publicly, but it stopped short of banning all communication. In crafting his restrictive order, Judge Matsch looked to the American Bar Association Model Rules as a guide. The literature shows that the A.B.A. Model Rules had evolved from the *Sheppard v. Maxwell*, through *Nebraska Press Association v. Stuart*, to *Gentile v. State Bar of Nevada*. The rules allowed attorneys to comment about procedural issues out of court, and they could state that their clients denied the charges against them, but they could not offer opinions about the case or discuss evidence in the case.

Judge Matsch wrote the order so that it extended to all persons under the court's authority. Specifically, the order mentioned "... marshals, deputy marshals, court clerks, bailiffs, court reporters, and employees or subcontractors retained by the court-appointed official reporters."[6] McVeigh's lawyers would later accuse the government of attempting to circumvent the order after the *Dateline NBC* broadcast in September 1996 featured interviews with two former federal prosecutors and a former F.B.I. agent. McVeigh's attorneys claimed the government was leaking information through former investigators, who were not subject to the restrictive order by virtue of the fact that they were no longer government employees. This was one example of why the McVeigh

team claimed it should be allowed to continue its strategy of allowing McVeigh to speak with reporters even after the issuance of the restrictive order. Judge Matsch did not allow the McVeigh team's media plan, and the restrictive order would stand until the McVeigh trial began.

In the gag order issued in April 1997, Judge Matsch wrote that the case had entered a critical period – the trial stage. The judge's writings in the order show he had a particular concern that public statements made during the trial phase could influence jurors. Judge Matsch wrote that statements made by attorneys or defendants could be particularly influential on jurors, and though the judge had instructed jurors not to read, view, or listen to reports about the case, the best insurance against undue influence was to end all out-of-court statements.

Judge Matsch looked to the precedent of *Sheppard v. Maxwell* in crafting the gag order. The precedent of *Sheppard v. Maxwell* was evident in the gag order in two ways. Restricting statements made by persons under the court's authority was one of the proscriptive measures specifically mentioned in the *Sheppard* decision. Judge Matsch did this in part because he had decided not to exercise the fourth proscriptive measure offered by *Sheppard* – sequestering the jury. Since Judge Matsch could not be certain jurors would avoid the press, he mandated that attorneys and all other trial participants avoid the press. The judge's order affected case management by stopping all extrajudicial statements by persons under the court's control at the beginning of the McVeigh trial.

McVeigh's Media Access Plan

The restrictive order of June 1996 placed an obstacle before the McVeigh team's strategy for dealing with the press and combating prejudicial pretrial publicity. Between June 1995 and April 1996, Stephen Jones had arranged four print media interviews with McVeigh for publication and two broadcast interviews. Jones had also arranged several off-the-record meetings between McVeigh and journalists in anticipation of future on-the-record interviews as the case neared trial. The restrictive order, however, put that plan in jeopardy.

The detailed media access plan that Jones presented to the court in August 1996 was a continuation of his effort to combat prejudicial pretrial publicity while remaining in compliance with the court's restrictive order. Jones said that he designed the plan to include local, national, and international press organizations in order to access as wide an audience as possible. An examination of the plan shows it was a highly elaborate and detailed public relations proposal. If the plan had been successful, McVeigh would have had access to a range of press organizations from specifically selected markets – such as Denver and Oklahoma City – as well as a national and international audience. This would give McVeigh an opportunity to influence public opinion about him on a broad scale and in the area where prospective jurors could read, see, and hear the report also. Jones admitted the plan was part of his broader public relations plan, but he said it was not his intent to claim McVeigh was innocent of the crime. Jones considered the plan an attempt to rehabilitate McVeigh's image.

The prosecution and the Nichols team objected to the plan, calling it a bold and elaborate attempt to influence jurors. Judge Matsch said it was exactly that in his bench

ruling on the matter. The judge denied the plan, thus ending McVeigh's contact with the press for the remainder of the case. The literature does not show evidence that a media access plan like the one proposed by Jones had ever been attempted before. The degree to which the McVeigh plan might have helped McVeigh's case will never be known. What is known is that the restrictive order on June 1996 greatly reduced extrajudicial statements, and the gag order of April 1997 ended them all together.

Judge Matsch's denial of the McVeigh media plan suggests an inconsistency in the judge's management of McVeigh's media contacts throughout the case. The findings show that after Judge Matsch took over the case in December 1995, McVeigh had several off-the-record meetings with journalists as well as three print interviews and two appearances on network television. Judge Matsch did not seek to prevent these meetings nor did he sanction the McVeigh team following publication of the stories. However, Judge Matsch did deny the McVeigh media plan following his issuance of the restrictive order claiming the plan was an attempt to influence potential jurors. Why the judge saw the latter proposal for McVeigh to speak to reporters as a threat to the integrity of the process, but did not view the earlier meetings also as a threat is not clear. Even so, the judge obviously changed his position on media access for McVeigh, which the McVeigh defense team considered detrimental to its strategy.

Confession Stories

Press reports implicating the suspects in the bombing case became a fair trial/free press issue just before jurors were seated in both the McVeigh and Nichols trials. In both cases, the information the stories were based on was information that by

court rules should have been kept secret. In each instance, the stories did not stop the trials, but the stories were of great concern for each defense team.

The McVeigh team faced a crisis just before jury selection began when *The Dallas Morning News* published a story based on internal defense documents claiming McVeigh had admitted to bombing the Murrah building. The story was picked up by other print media, and, less than two weeks later, a similar story appeared on the Web site for *Playboy*. Following the *Playboy* story, all three broadcast networks and the ABC news magazine *Prime Time Live* dedicated time to the confession stories. Stephen Jones said the network television coverage of the alleged confession was more damaging than the print reports, and he claimed the coverage essentially eliminated any chance of McVeigh receiving a fair trial.

Pretrial confession stories have been problematic events throughout the history of American jurisprudence. In the Manson case, the reported confession of suspect Susan Atkins frustrated both prosecutors and defense attorneys. Prosecutor Bugliosi said the Atkins confession made it more difficult to find jurors who had not heard stories about it. In the Shepherd case and in the Irvin case, there was evidence that jurors had heard reports that the suspect had confessed to the crimes prior to trial. The Supreme Court was highly critical of these confession reports.

The findings show that the information that led to *The Dallas Morning News* story came from internal defense documents. Jones has written that the defense team member who leaked the documents did so without authorization; however, the findings also suggest Jones's *quid pro quo* strategy with the press created an environment in which such a situation could arise. Had Jones not established a give and take

relationship with the press, the meeting during which the documents were leaked might never have happened. The end result was that a highly damaging story appeared in the press on the eve of jury selection in the McVeigh Trial.

Jones filed a motion seeking to dismiss the charges against McVeigh, to delay the trial, or to receive another change of venue. Judge Matsch exercised judicial discretion in denying the motions. Judge Matsch wrote that the solution to the problem created by the confession stories was to move forward with the case and bring it to trial as soon as possible. Jones called the judge's decision an inconsistency in his management of the case. Jones claimed the judge had gone to great lengths to prevent pretrial publicity from impacting the case, but after the McVeigh confession stories appeared on the eve of jury selection, Judge Matsch expressed little concern the stories would influence potential jurors. The findings show Judge Matsch relied on experience and discretion in determining that the McVeigh trial should move forward. Judge Matsch wrote that he had admonished prospective jurors to begin avoiding press reports about the trial when summonses went out prior to *The Dallas Morning News's* story, and the judge apparently felt those precautions were sufficient to protect against pretrial publicity that might emerge after that point.

Judge Matsch's decision to move forward with the trial in spite of the confession stories suggests he had come to the conclusion that *voir dire* would be the best protection against juror bias. This was a complete reversal from the position he had previously held. In February 1996, the judge determined prejudicial pretrial publicity in Oklahoma was so great that a change of venue was in order because *voir dire* alone would not be sufficient protective measure, and yet, on the eve of the trial when news

spread across the country that McVeigh had confessed to the crime, the judge had changed his mind and claimed *voir dire* was indeed enough to protect McVeigh's right to a fair trial. Jones noted the inconsistency in Matsch's decision. Jones also claimed that the national coverage of the confession stories eliminated any chance McVeigh had at receiving a fair trial. The findings suggest that with so much time, effort, and expense invested in the case, the judge apparently decided the court must move forward with the case and *voir dire* would have to be the court's primary tool to use in preserving the integrity of the process.

The Nichols defense team faced a somewhat similar situation on the eve of jury selection in that trial. Just days before jury selection was to begin, *The Oklahoman* published portions of Nichols's statements to the F.B.I. during his questioning at the Herrington, Kansas, Police Department on April 21, 1995. The information from the story apparently came from Exhibit 72, which had previously been sealed by the court with only redacted portions released publicly. While the government denied leaking the document to the press, the findings suggest that the information almost certainly had to have come from either the government or a member of one of the defense teams. As in the McVeigh trial, the publishing of Nichols's statements did not result in a delay of the trial. In this respect, the court was consistent in its rulings, and it allowed the Nichols trial to move forward. The findings suggest Judge Matsch had little choice but to again rely on *voir dire* to identify and excuse potential jurors who were biased against Nichols. This had been the course he set following the confession stories preceding the McVeigh trial. Had Judge Matsch taken a different course of action prior to the Nichols trial, it would have given the McVeigh defense ample grounds for appeal.

In regard to the confession stories, Judge Matsch turned to what he apparently believed was the most venerated precedent – *voir dire*. In doing so, the judge set his own precedent that required him to take similar actions when an incriminating story appeared on the eve of the Nichols trial. Judge Matsch had to rely on *voir dire* again in the Nichols case. Had he not done so and allowed a delay or a change of venue for Nichols, the McVeigh's attorneys would have seized on this inconsistency as grounds for appeal. To the extent that the incriminating stories that appeared just before both trials were not successful grounds for overturning the convictions of either McVeigh or Nichols, Judge Matsch's strategy was successful. However, his decisions related to the confession stories suggest an inconsistency in his rulings regarding the threat of pretrial publicity and the protective power of *voir dire*.

Restrictions on Juror Information

The findings show that the court took special measures to protect the identities of jurors and to shield them from contact with the press. Judge Matsch used a system of numbers instead of names to identify jurors and ordered *voir dire* transcripts sealed until after the trials. He also had a wall constructed to shield jurors from the view of the closed-circuit camera and part of the courtroom. Though the press protested, these measures would stay in place through the McVeigh trial, and they were altered only slightly for the Nichols trial. During the *voir dire* for Nichols, Judge Matsch granted the defense request to hold challenges in open court, but the anonymity of individual jury candidates was still protected.

Judge Matsch showed particular concern about the press speculating on the background and psychological profiles of the jury. In the *Sheppard v. Maxwell* decision,

the Supreme Court was critical of the fact that the press had published pictures of the jurors and their names and home addresses. Jurors later told the trial court that they had been contacted by people offering opinions about the case. Judge Matsch wanted to avoid such a situation. The judge exercised his discretion in crafting his rules for jurors. Though the press sought to make the process more open, the judge stood by his order, and it was not appealed. The record shows no evidence that the press attempted to contact jury candidates, jurors, or their associates during either trial. In that respect, the judge's restrictions on juror information met their intended goal.

Closed-Circuit Broadcasting

The Oklahoma City bombing trials were and to date still are the only federal criminal trials to include live television broadcasts of any kind. The broadcasts were conducted via a closed-circuit feed and viewed only by court certified victims. This was a truly unique feature of the bombing trials. Two of the research questions in this study focused specifically on the closed-circuit broadcasts, asking how the closed-circuit viewing provisions became a part of the Antiterrorism and Effective Death Penalty Act of 1996 and how the court implemented and managed the closed-circuit viewing provision of the new law.

The finding show closed-circuit broadcasts became part of the Antiterrorism Act, and later the trial, as a result of the change of venue that moved the case to Denver. The possibility of the change of venue spurred some victims to actively explore the possibility of closed-circuit broadcasts before Judge Matsch issued the change of venue order in February 1996. Attorney Karen Howick, working on behalf of thirteen victims, had already had discussions with members of Oklahoma's congressional delegation and

Court TV about the feasibility of closed-circuit coverage. Once Judge Matsch granted the change of venue, the efforts to make closed-circuit broadcasts part of the trial increased quickly.

The day after the judge issued his change of venue order, Senators Don Nickles, Jim Inhofe, and Orin Hatch sent a letter to Janet Reno asking for the Justice Department's help in getting closed-circuit broadcasts. Attorney General Janet Reno said the department would explore the possibilities, but by mid-March 1996, the Justice Department had decided not to take an active role in facilitating closed-circuit broadcasts. The decision was based on fears that involvement by the Justice Department in advocating for closed-circuit legislation might be grounds for an appeal. The Justice Department was not willing to take that risk. The closed-circuit issue was left to Congress. If there were to be closed-circuit coverage, it would have to come through legislation, and there was no guarantee the court would comply.

The findings show the closed-circuit legislation that became a part of the Antiterrorism and Effective Death Penalty Act of 1996 was drafted quickly, and it focused squarely on accommodating the victims. The victims were a driving force behind the legislation. The group led by Howick actively pursued elected officials, and they made public appearances with those officials at key stages in the legislative process. Victims appeared with lawmakers at a news conference announcing plans for the house bill, and victims appeared with President Clinton at the signing ceremony for the Antiterrorism Act. The advocacy of the victims for the legislation and sentiment for the victims appear to have played a significant role in passage of the closed-circuit legislation. It is likely that without the advocacy of the victims and the actions of

Congress, closed-circuit broadcasts of the Oklahoma City bombing trial would not have happened.

Though the legislation passed, bringing closed-circuit broadcasts to the trials was not a certainty. Section 235 of the Antiterrorism Act could only be implemented if the court set aside its fifty-two-year-old ban of photographs and broadcasting contained in Rule 53. The path for the closed-circuit provisions was made somewhat easier when the Judicial Conference of the United States sent word to Congress that it did not view the closed-circuit provisions as a precedent threatening Rule 53, provided the legislation was limited in scope and allowed for judicial discretion in its implementation.

In May 1995, the government filed its motion asking the court to comply with the Antiterrorism Act and allow closed-circuit broadcasting. Prosecutors claimed the law called for limited viewing, and it allowed the judge to use his discretion in establishing criteria for viewers and operation of the feed. Prosecutors claimed the court could operate within the law and not threaten the integrity of the trial. Though the Justice Department would not advocate for the creation of a law to provide closed-circuit broadcasts of the trial, fearing the implications it might bring on appeal, the Justice Department actively advocated for the law once it was passed.

The defense teams objected, claiming that the law violated the separation of powers doctrine and that it threatened the defendants' rights to due process and to a fair trial. The major concerns expressed by the defense teams focused on the detrimental effects cameras would have on trial participants and threats the cameras might pose to courtroom decorum. These were two of the factors referenced in *Estes v. Texas* that led the Supreme Court to determine that cameras had interfered with the trial. In the end,

however, Judge Matsch determined that the law was not unconstitutional, and he decided to make closed-circuit broadcasting a part of the trials. As the findings show, Judge Matsch used the provisions as stated in Section 235 and judicial discretion in implementing the closed-circuit broadcasts.

The findings show Judge Matsch restricted the viewing to court-approved victims and utilized the registration process already established through the Western District Victim Assistance Unit to ensure that only qualified viewers would be allowed to attend the viewings. The press was unsuccessful in attempting to gain access to the closed-circuit viewing. Press attorneys presented a seemingly contradictory argument in seeking access. First, they claimed the remote viewing was merely an extension of the Denver courtroom. From this extended courtroom position, press attorneys claimed the court could not deny the press and public access. But then press attorneys claimed that the remote viewing location was a new public space that the press and public should have access to with only minimal court oversight. The government and both defense teams objected to the press request for access to the viewing. They argued that the law was clear in its intent to provide the closed-circuit broadcasts for victims who could not attend proceedings in Denver due to the change of venue. The McVeigh team in particular expressed concerns that opening the viewing to the press and public would create a spectacle in a stadium atmosphere, which had been one of the chief concerns addressed in the *Estes* and *Chandler* decisions. The press request for access was not successful. The findings show that Judge Matsch interpreted Section 235 as a narrowly-tailored law providing a right of access to the victims only. The judge also determined

that since the press had ample access to the actual courtroom in Denver, the press could not make a claim that their right of access to the court had been violated.

Next, the court turned its attention to the practical aspects of operating the closed-circuit broadcasts. To ensure the signal would not be pirated, the judge made the court responsible for all equipment associated with the broadcast. He also forbade any recordings of the broadcasts, and he set the viewing site at a federal facility with limited public access. To protect the integrity of the proceedings, the judge allowed only a single camera with a panoramic view to be mounted to the wall in the back of the courtroom. This was similar to the provisions of the Florida courts, which the Supreme Court claimed in *Chandler* made the presence of cameras less problematic. Judge Matsch also had the jury wall constructed to obscure the camera's view of the jury and to obscure the jurors' view of the camera. The judge had the ability to turn off the feed at any time from the bench, and he required the viewing location in Oklahoma City to operate under the same rules for decorum as the courtroom in Denver.

In creating the procedures for the closed-circuit broadcasts, Judge Matsch did not have much relevant guiding precedent in what to do. No other federal judge had faced a similar situation. There was, however, some guidance in what not to do. It came in part from the Supreme Court's opinion in *Estes v. Texas*. The case was cited by Nichols's attorneys in their motion seeking to prevent the closed-circuit broadcasts. In the *Estes* opinion, the Court determined that the presence of the cameras, lights, and other apparatus had disrupted the courtroom to such a degree that the defendant's rights had been violated. The findings of this study show that Matsch took extensive measures to make sure the equipment for the broadcasts and the operation of the broadcasts were

as unobtrusive as possible. Judge Matsch's procedures protected against two of the primary concerns about cameras expressed in the *Estes v. Texas* decision. These were the fear that the presence of cameras would distract trial participants and the fear that cameras would intrude on the relationship between defendants and their attorneys. Matsch opted for a single camera attached to the back wall of the courtroom that provided only a panoramic view of the courtroom. This meant that the jury and intimate exchanges between the defendants and their council would be shielded from the camera's view. The judge also mandated that he control the feed. The judge apparently did not find this to be a distraction; rather it was a necessary requirement for him to maintain control of what was transmitted out of the courtroom. In press reports, Judge Matsch's brother claimed the judge was well aware of the criticism that followed the O.J. Simpson trial and the court's use of cameras in that trial. One of the primary criticisms was that trial participants performed for the cameras. What is known about Judge Matsch's rules for courtroom decorum made such a situation less likely in the bombing case as well as the fact that the proceedings would not be broadcast to the public. Limited viewing lessened the chances that trial participants would feel compelled to perform for the cameras.

Trial participants had differing reactions to the closed-circuit broadcasts. The findings show that prosecutors asked the Tenth Circuit Court of Appeals to allow closed-circuit coverage of McVeigh's appeal hearing. This suggests that the government found the broadcasts useful and not problematic. Though he had concerns that the presence of cameras would influence the courtroom performance of trial participants, Michael Tigar expressed a positive opinion of the closed-circuit

experience. Tigar said the broadcasts did not have a negative effect on the Nichols trial, and he suggested any future court using closed-circuit broadcasts of a high profile trial should consider taping the proceedings and releasing the tapes after final disposition of the case. Stephen Jones expressed an opposite opinion. Jones said the closed-circuit broadcasts did have a negative effect on the press's trial coverage. Jones said a remote viewing location provided a platform for victims to voice opinions critical of the defense. After each day's testimony, Jones claimed victim viewers left the auditorium and spoke to reporters most often in support of the government's case. This, Jones claimed, amounted to cheerleading for the government.

The availability of closed-circuit viewing of the Oklahoma City bombing trial was clearly a response to the court's decision to move the trial to Denver. Bombing victims who claimed the change of venue prevented them from attending the trial were influential in securing the legislation in the Antiterrorism Act that opened the door for closed-circuit viewing. The findings show that the court reluctantly agreed to comply with the closed-circuit provisions of the act over the objections of both defense teams. Once the court decided to allow closed-circuit broadcasts, Judge Matsch crafted stringent rules that limited viewership to court approved victims only. The judge also established strict procedures for technical aspects of the closed-circuit broadcasts so that the integrity of courtroom proceedings was protected, the security of the feed was ensured, and the judge's control over the broadcast equipment was complete. Should another federal court face circumstances in which closed-circuit broadcasts are an option, the procedures established by Judge Matsch will likely provide a model to guide the court.

Summary and Overall Conclusions

Research question #1 asked what were the fair trial/free press issues brought before the courts in the Oklahoma City bombing trials. The findings confirm there were several of these issues. These fair trial/free press issues arose from the intense press attention given to the case. Press and public interest in the case was understandable. The Oklahoma City bombing and ensuring trials were unique events in history. The bombing itself was an act of terrorism that had resulted in the deaths of 168 people. It was a case of great public importance, and the press and the public claimed a right to know about the crime, the suspects, and the prosecution of those suspects. With so much attention focused on the bombing case, fair trial/free press issues pitting the First Amendment right of the press to report on the case against the Sixth Amendment rights of the defendants to receive a fair trial were bound to emerge.

The court's primary goal was to ensure that the defendants received a fair trial. The primary threat to a fair trial came from press coverage and the possibility that it would make seating an impartial jury difficult. Pretrial publicity was implicit in almost every fair trial/free press issue raised in the case. This threat was magnified in the Oklahoma City bombing case due to the nature of the crime and the nature of the mass media at the time.

The crime attracted the attention of press organizations from across the nation and around the world, and by 1995 their reach was expanding. Newspapers had begun using the Internet, giving them more access to the public. The Internet also provided an empowering new medium for people interested in the case to seek out information. The broadcast news media also had an expanded reach through twenty-four-hour cable news

networks and prime time news magazines. These technological advances meant the press had the ability to spread more information to more people more often than ever before.

The literature shows most of the precedent-setting cases regarding pretrial publicity took place before 1980. The courts in those cases did not have to contend with the Internet, cable news networks, and other mass media technologies present at the time of the Oklahoma City bombing. The Supreme Court recognized this fact in *Gentile v. State Bar of Nevada*. In the *Gentile* decision, Justice Rehnquist pondered whether the increasingly pervasive press made some existing remedies to pretrial publicity less effective. The Oklahoma City bombing trials provided a test of established fair trial/free press in this enhanced media environment.

Research question #2 asked how the courts relied on precedent to resolve the fair trial/free press issues raised in the case. Research question #3 asked how the courts' resolution of fair trial/free press issues affected management of the case. The findings show the courts often relied on precedent in resolving fair trial/free press issues in the Oklahoma City bombing case, and resolution of those issues impacted the management of the case in several ways.

The findings show Judge Matsch did use precedent to resolve several of the fair trial/free press decisions. In his first decisions regarding sealed documents, he used *Press-Enterprise II* to craft a narrowly-tailored order that protected discovery information and gave the press a means of challenging future requests to seal documents. Guided by *Sheppard v. Maxwell*, the judge made the decision to grant the change of venue and move the case to Denver. *Sheppard*, *Nebraska Press Association*,

and the A.B.A. Model Rules were influential in the judge's restrictive order on extrajudicial statements and the later gag order. All of these decisions were made to preserve the defendants' rights to a fair trial and to counter the effects of pretrial publicity. None of the orders was overturned, and the convictions of the defendants stood as well, thus the orders can be considered successful in achieving the court's goal.

The findings show the court was not successful, however, in stopping information leaks that plagued the trial. In *Gentile v. State Bar of Nevada*, Justice Kennedy wrote that prosecutors hold a distinct advantage in access to the press compared to defendants. In the Oklahoma City bombing case, Kennedy's observation was illustrated on a grand scale. Thousands of journalists were hunting for information in the case, and they had multiple avenues to get that information. Hundreds of law enforcement personnel had worked on the case from the F.B.I. to Oklahoma City Police officers. Tracking down the individual source of any one information leak would be a difficult task at best. It would also delay prosecution of the case. These were the reasons Judge Matsch gave for not conducting an investigation prior to issuing his June 1996 restrictive order on extrajudicial statements. Had the judge attempted to investigate the source of leaks, it might have sent a clear message to prosecutors and defense attorneys that the court would take a firm stand against leaks and do what was within the court's power to sanction those who released information that threatened the case. Judge Matsch was not the only judge who could have taken a more firm stance against leaks. Had the Western District judges restricted extrajudicial statements from the beginning of the case, the stream of leaks may have been slowed, though it is doubtful it would have stopped them completely. In *Sheppard v. Maxwell*, the Supreme Court said that

trial courts did have the power to restrict extrajudicial statements made by persons under the court's authority, and that included law enforcement.

The findings suggest that restricting extrajudicial statements early in the case might have also prevented other fair trial/free press issues that emerged as the case progressed. A restrictive order or gag order would have made the McVeigh team's three-prong press strategy impractical. The findings show this strategy played a significant role in the confession stories that threatened McVeigh's trial just before it began. An early restrictive or gag order likely would also have prevented McVeigh from speaking to the press, an aspect of the trial that drew criticism from both the Nichols defense team and prosecutors. The findings show that the June 1996 restrictive order blocked the McVeigh team's plans to take their public relations campaign to a national and international audience. Still, McVeigh had already given interviews to several publications and had appeared on network television prior to that time. Jones claimed that he needed press access to combat the steady stream of leaks from government sources, and the findings show his argument had merit. However, had the court issued an order that applied to all persons under the court's authority – including law enforcement – at the beginning of the case, it may have leveled the legal playing field and made the McVeigh defense strategy focusing on actively seeking the press unnecessary.

Sheppard v. Maxwell clearly stated that judges could exercise discretion in trial management to protect the integrity of the trial process. Judge Matsch did use discretion in managing some aspects of the case, particularly those that involved the press working in and around the courthouse. The case attracted a large number of journalists. Nearly

2,000 would receive credentials to cover the McVeigh trial. Judge Matsch had to balance the First Amendment rights of press access to the court with the court's need to maintain decorum.

The findings show Judge Matsch was accommodating to the press, but his accommodations had clear boundaries, and he was quick to step in when he felt the press had overstepped his boundaries. Judge Matsch gave the press reserved seating in the courtroom, and he held a special meeting with journalists prior to the beginning of proceedings in Denver to inform them of his rules for courtroom decorum. The judge's decision to establish the audio feed to the auxiliary courtroom and eventually to the pressroom was a result of the extreme press interest in the case, and the findings show that the audio feed did not interfere with the court's operations. The sale of audiotapes of court proceedings was a different matter. The findings show that the court did not anticipate that some broadcast news media would air the recordings. Matsch's local court rules did not directly prohibit airing the tapes as some courts did, thus the journalists may have believed they were not prohibited from using the tapes as they chose. The judge clearly thought otherwise, and he exercised his discretion in stopping the sale of audiotapes immediately.

Judge Matsch was not as accommodating to the press during the jury selection process. The findings show that the judge did not want juror information in the press, fearing such information would invade the privacy of the jurors and possibly interfere with a fair trial. In *Sheppard v. Maxwell*, the Supreme Court was critical of the fact that the press reported jurors' names and published photographs of them. Judge Matsch exercised his discretion and established procedures to prevent such things from

happening in the Oklahoma City bombing trials. Having seen the volume and veracity of press coverage leading up to jury selection, the judge indicated he was concerned that the press would aggressively pursue stories about the jurors and their backgrounds unless he took measures to prevent it. The findings support the conclusion that the press did not produce stories that threatened jury selection, and, in that respect, Judge Matsch's protective measures achieved the results he wanted. The findings show that Judge Matsch's actions illustrate how a judge could use his authority and discretion to manage a crucial aspect of a highly publicized case.

While both defense attorneys generally praised Judge Matsch for his overall management of the case, Jones claimed the judge's decision to move forward with the McVeigh trial in spite of the damaging confession stories doomed McVeigh's opportunity for a fair trial. The findings support Jones's claim that Judge Matsch completely changed his stance on pretrial publicity and the power of *voir dire* to mitigate such issues between February 1996 and April 1997. In this respect the judge's decisions were inconsistent. In February 1996, Judge Matsch determined pretrial publicity was such a substantial threat and *voir dire* was such an insufficient remedy that a change of venue was required. However, in April 1997, the judge had come to the opinion that *vior dire* could effectively combat the effects of pretrial publicity generated by the McVeigh confession stories. The findings suggest that Judge Matsch may have come to recognize the limits of his control, and with so much time, effort, and expense already invested in the case, he believed the best option was to move forward with the McVeigh trial and to use *voir dire* as the method to mitigate the effects of the confession stories.

One of the unique fair trial/free press issues that occurred as part of the Oklahoma City bombing trials that may inform scholars and future courts was the press consortium. The consortium was a direct response to the large number of press organizations planning to cover the trials. There were historical examples of highly publicized trials in which journalists had been criticized for their performance during trial. These examples included the Hauptmann trial, *Sheppard v. Maxwell*, and the O.J. Simpson trial. The press corps took the lead in forming the respective print and broadcast groups that would serve as the foundation of the consortium. Members of the press corps realized that they held the responsibility to police their own and not to disrupt the trial process. The City of Denver and the court had obvious concerns with the onslaught of the press, and the consortium provided a means for all parties to communicate concerns and coordinate logistics, thus preventing a situation that could have easily turned into chaos. The findings show that the consortium was successful in meeting the needs of the press, the court, and the city. The legacy of the consortium is that it showed how the courts and the press, often adversaries in fair trial/free press issues, can find common ground and work together in a fashion that protects both the court's interest in preserving Sixth Amendment rights and the press's interest in preserving First Amendment rights.

Research questions #4 and #5 addressed closed-circuit broadcasts of the Oklahoma City bombing trials. Research question #4 asked how the closed-circuit viewing provisions became a part of the Antiterrorism and Effective Death Penalty Act of 1996. The findings support a conclusion that this was a direct result of Judge Matsch's order moving the trials to Denver. Research question #5 asked how the court

implemented and managed the closed-circuit broadcasts. The findings support a conclusion that Judge Matsch looked to the specifics of the new law and exercised judicial discretion in his acceptance and implementation of closed-circuit broadcasting.

The findings regarding the closed-circuit broadcasts of the trials support the conclusion that these broadcasts were some of the most unique aspects of the Oklahoma City bombing trials. The trials were the first and to date the only federal criminal trials with any type of live television presence. The change of venue, moving the trial from Oklahoma City to Denver, was the catalyst for the closed-circuit campaign led by bombing victims. Congress was sympathetic to the victims' plight, and the closed-circuit provisions of the Antiterrorism and Effective Death Penalty Act of 1996 passed and were signed into law in just more than one month.

The quick passage of the closed-circuit provisions was evidence of the groundswell of support and sympathy for the victims. Some of those victims felt betrayed by Judge Matsch when he moved the trial to Denver, and they would feel further betrayed if the judge did not allow closed-circuit coverage. Judge Matsch's own public comments about the issue show he was firmly opposed early on, but by the time the law was passed, he said he would at least consider it. The judge said he would consider the closed-circuit broadcasting the same week the justices of the Judicial Conference of the United States said they would not oppose the new law. It can be concluded that the position taken by the Judicial Conference influenced Judge Matsch.

Judge Matsch had no direct precedent to guide him in deciding whether or not to comply with the new law. He had before him a new law that no court had considered before. The findings show that Judge Matsch determined that the law did not violate the

Constitution's separation of powers doctrine. He also determined that the law was tailored to the interest of the victims and that the broadcasts could be restricted to this limited audience. Furthermore, the law allowed the judge to exercise his discretion in how to manage the broadcasts, giving him total control over the process. Under these conditions, Judge Matsch agreed to make the Oklahoma City bombing trials the first federal criminal trials conducted in the presence of a closed-circuit camera.

The Oklahoma City bombing trials brought cameras to a federal criminal trial. It was a forum that cameras had been banned from for more than half a century. The ban established in Rule 53 was based on the belief that cameras threatened the court's ability to conduct a fair trial. The Oklahoma City bombing case showed that, with a tightly-controlled process and with a limited audience, cameras could be a part of a federal criminal trial without prejudicing the process. The findings of this study suggest that should another federal court face the prospect of closed-circuit broadcasting, the Oklahoma City bombing trials will provide the precedent to guide that court.

The Oklahoma City bombing case was like no other case before or since. It was a terrorism trial of great national importance, and it generated great public interest. The press attention focused on the crime and the prosecution of the suspects made the case replete with fair trial/free press issues. The courts managing the case employed precedent and judicial discretion in resolving those issues.

Judge Matsch was responsible for most of the major fair trial/free press decisions in the case, and all of his decisions survived appeal. Judge Matsch also became the first federal judge to manage a capital criminal case with live closed-circuit broadcasting. This aspect of the trial was unprecedented. Stephen Jones suggested that

the legacy of the Oklahoma City bombing case might well be the trial court's management of fair trial/free press issues.

As an overall conclusion supported by the findings of this study, the Oklahoma City bombing case stands today as perhaps one of the most thorough tests of fair trial/free press doctrine in a single case. The intense and widespread press coverage focused on the case, the magnitude of the crime, the number of fair trial/free press issues raised in the case, and the fact that the trials were the first and only federal criminal trials to include closed-circuit broadcasting support such a claim. The trial court managing the case developed fair trial/free press strategies that withstood all appeals under the burden of intense national and international press coverage. This suggests courts can rely on existing precedent to balance First Amendment and Sixth Amendment issues even in the face of the most extensive press coverage. The media environment in which the case unfolded included a new medium for news dissemination – the Internet. This likewise suggests courts can successfully employ existing precedent and procedures to manage fair trial/free press issues when faced with new media technology. The trial court in the Oklahoma City bombing case also adopted and implemented the closed-circuit provisions of the Antiterrorism Act, indicating that even federal courts can incorporate cameras without threatening the integrity of trials. The findings show the courts managing the Oklahoma City bombing case negotiated all of these fair trial/free press issues by developing legally sound strategies based on precedent and judicial experience and discretion. Considering all of these facts together, it seems clear that attorney Jones is correct in his assessment. The successful strategies the courts developed to manage the fair trial/free press issues in the Oklahoma City

bombing case have established valuable and important precedents as to how future courts facing highly publicized trials may also successfully manage conflicts between the First and Sixth Amendments.

Limitations

This study was limited by the availability of some source materials. Archival information at the Oklahoma City Memorial Museum Archives is extensive; however the research revealed some limitations. The archive's holdings of motions, orders, and opinions from the District of Colorado appear almost complete, but the archive's holdings from the time the case was under the management of Western District judges are less so. Also, the archive has only a few transcripts for pretrial motions hearings. Access to these documents would have assisted in analysis of some issues presented in the study.

The study was also limited by the participation of only defense attorneys in oral history interviews. Interview requests were sent to the judge, prosecutors, the press attorney, and the defense attorneys, but the two lead defense attorneys were the only trial participants who agreed to interviews. While the participation of Stephen Jones and Michael Tigar added greatly to the study, the perspective of other trial participants would have brought other valuable perspectives.

Suggestions for Future Research

This study has shown how fair trial/free press issues played a role in one of the most highly publicized criminal cases in American history – the Oklahoma City bombing case. One of the unique aspects of the case that could have consequences for its effects on future highly publicized criminal trials was the formation of the press

consortium and its efforts to work with the court and the City of Denver. The findings of this study show that the logistical details worked out between these parties were extensive and effective in meeting the needs of all parties. The findings also suggest there is much still to be learned about the bombing trial consortium, and there is little research in existence that examines the consortium in depth. A historical study focusing on the bombing trial consortium itself would add to the fair trial/free press literature.

Another area with potential for future research is to examine the extent to which the closed-circuit coverage of the case influenced press coverage of the trials. Stephen Jones claimed the closed-circuit broadcasts led to public comments made by victim viewers that amounted to cheerleading for the prosecution, which in turn influenced press coverage and public perceptions of the trials. A content analysis of press coverage during the trials would help determine if Jones's claim had merit.

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